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No. ____

IN THE
Supreme Court of the United States

EVAN GRIFFITH,

Petitioner,

v.

DAVE REDNOUR, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Evan Griffith ("Griffith") seeks review of an opinion of the Seventh Circuit affirming the dismissal of his federal habeas corpus petition on the ground that the petition was filed 14 days late and therefore outside of the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Three judges of the Seventh Circuit dissented from the denial of rehearing *en banc*.

The questions presented in this petition are:

1. Did the Seventh Circuit erroneously apply this Court's decisions in *Carey v. Saffold*, 536 U.S. 214 (2002) and *Evans v. Chavis*, 546 U.S. 189 (2006), and create a conflict with the approach taken by other circuits when it ruled for purposes of the statute of limitations in AEDPA that the Illinois Supreme Court could not make a state Petition for Leave to Appeal "timely" by granting a retroactive 14-day extension of time pursuant to established state court rules and decisions?

2. Whether the Seventh Circuit erred in ruling that the one-year statute of limitations in AEDPA governing a federal habeas corpus petition should be enforced – and review on the merits denied – against a petitioner who presents a credible claim of actual innocence?

PARTIES TO THE PROCEEDING

The parties appearing here and below are (1) Evan Griffith, the petitioner named in the caption, and (2) Dave Rednour, Warden at the Menard (Illinois) Correctional Center.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Evan Griffith ("Griffith") respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The 3-1-3 opinion of the Illinois Supreme Court affirming Evan Griffith's conviction and death sentence on direct appeal is reported at 634 N.E.2d 1069 (Ill. 1994), and included in the Appendix at 99a to 140a.[1] The July 13, 2005 order of the Illinois Appellate Court affirming the trial court's order denying Griffith's state post-conviction petition is unreported. (App. 46a-98a.) The December 1, 2005 decision of the Supreme Court of Illinois denying Griffith's Petition for Leave to Appeal is unreported. (App. 25a.) The March 30, 2009 decision of the United States District Court for the Central District of Illinois denying Griffith's 28 U.S.C. § 2254 habeas petition as untimely is unreported. (App. 27a-44a.) The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court is reported at 614 F.3d 328 (7th Cir. 2010) and is reproduced in the Appendix at 13a to 19a. The order of the Seventh Circuit denying the petition for

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[1] On January 10, 2003, the Governor of Illinois commuted Griffith's death sentence to life in prison without possibility of parole

rehearing and rehearing *en banc*, together with the dissenting opinion of three judges, is reported at 623 F.3d 1166 (7th Cir. 2010) and is reproduced in the Appendix at 1a to 12a.

JURISDICTION

The Court of Appeals for the Seventh Circuit entered judgment on July 22, 2010. On October 28, 2010, the Seventh Circuit denied Griffith's timely filed petition for rehearing or rehearing *en banc*, with three judges dissenting. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1), which authorizes this Court to review a judgment of the Seventh Circuit denying a petition for writ of habeas corpus under 28 U.S.C. § 2254.

STATUTES INVOLVED

This case involves 28 U.S.C. § 2244 and 28 U.S.C. § 2254, which are reproduced at pages 153a to 160a of the Appendix.

STATEMENT OF THE CASE

A. The State Court Proceedings.

While incarcerated at the Pontiac Correctional Facility in 1990, Petitioner Evan Griffith became involved in a fight and stabbed fellow inmate Joseph

Moore.[2] The only issue at his 1992 trial was whether Griffith acted in self-defense. Five inmates, plus Griffith, testified to a similar version of the incident, with one significant difference: Griffith, inmate John Gibson, and inmate Kevin Walton each testified that Moore was the initial aggressor and that Griffith defended himself after Moore swung a shank at him. (R. 1341-43, 1357, 1377-80, 1410-11, 1413-15.)[3] Three other inmates – Michael Marzette, Bernie Cleveland, and Larry Nelson – each testified that Griffith and another inmate, William Mackey, were the initial aggressors. (R. 1252-54, 1269-71, 1284-86, 1309-10, 1315.)

Griffith was convicted of first-degree murder and unlawful possession of a weapon. After waiving a sentencing jury, the trial court sentenced Griffith to

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[2] Griffith (now 41 years old) was originally incarcerated in 1986 at age 16 based on a conviction for armed robbery and felony murder in Chicago. *United States ex rel. Griffith v. Hullick*, 587 F. Supp. 2d 899, 902 (N.D. Ill. 2008). In 2008, a district court judge granted habeas relief in the Chicago case based on egregious prosecutorial misconduct. *Id.* at 912-13. The State of Illinois did not appeal the grant of the Writ and proceedings are now pending on remand in the Illinois courts.

[3] Citations to the trial Report of Proceedings are to R.__; citations to the Post-Conviction Report of Proceedings are to PCR.__, citations to the Post-Conviction Common Law Record are to PCC.__; and citations to the Joint Appendix on Appeal in the Seventh Circuit are to JA__

death on the first-degree murder conviction and 30 years imprisonment on the weapons conviction.

Griffith presented a number of substantial constitutional claims to the Illinois Supreme Court, including claims that he was deprived of the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984), and that his "decision" not to have the jury instructed on a lesser-included offense was not knowing, voluntary, and intelligent. In a 3-1-3 decision, the Illinois Supreme Court rejected Griffith's claims without a majority opinion. (App. 90a-140a.) This Court denied Griffith's Petition for Writ of Certiorari on October 17, 1994. (JA104.)

On March 31, 1995, Griffith filed a petition for post-conviction relief raising a number of constitutional claims. Through no fault of Griffith, his state post-conviction petition took years to litigate. On February 21, 2002, the post-conviction trial court conducted an evidentiary hearing during which each of the State's three "eyewitnesses" recanted his trial testimony. Each witness testified that his trial testimony was false and that it was procured by the State through various threats, favors, and benefits. (PCR. 156, 172, 215, 222, 250, 256-59.) Griffith also demonstrated that the State failed to turn over significant *Brady* evidence, including the full criminal records of the State's witnesses and the victim, as well as previously undisclosed deals and benefits offered and provided

to the State's witnesses in exchange for their trial testimony. (PCR. 153-56, 164-68, 210-11, 213-16, 218-19, 221, 238-39, 257-59, 264-70, 274-76, 287-90; PCC. 1020-23; JA163-64.)

Notwithstanding, on August 22, 2003, the state post-conviction trial court denied relief and entered judgment against Griffith. The Illinois Appellate Court affirmed on July 13, 2005. (App. 46a-98a.)

As required by Illinois rules in effect at the time, on August 1, 2005, Griffith timely filed his Notice of Intent to Appeal, making his Petition for Leave to Appeal ("PLA") to the Illinois Supreme Court due on August 17, 2005. (JA422.) Because of illness, Griffith's appellate counsel did not file the PLA on August 17. Instead, 14 days later, on September 1, 2005, counsel filed a Motion for Leave to File the PLA *Instanter*. (App. 146a-152a.) On September 13, 2005, the Illinois Supreme Court granted the Motion for Leave to File the PLA *Instanter*. (App. 152a.) Indeed, the Illinois Supreme Court's docket sheet reflects that the PLA was due and filed that day. On December 1, 2005, the Illinois Supreme Court denied Griffith's PLA on the merits. (App. 45a.)

B. The Federal Habeas Proceedings

Three hundred sixty-four days later, on November 30, 2006, Griffith filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Central District of Illinois. The State filed its Answer on February 9, 2007. Nothing of substance happened for more than one year. On

March 3, 2008, the district court granted permission for the undersigned counsel to appear and file an Amended Petition to supersede the Original Petition. Griffith filed his Amended Petition on August 15, 2008.

In his Amended Petition, Griffith asserted, among other things, that he received constitutionally deficient representation from counsel and that the State knowingly presented false testimony at trial and violated the *Brady-Giglio* rules. Griffith's claims all demonstrate that the Illinois state courts' decisions were contrary to clearly established federal law and resulted in a decision that was based on an unreasonable determination of the facts.

On December 5, 2008 – two years after the Original Petition was filed – the State sought leave to file a motion to dismiss the petition, arguing that Griffith's habeas petition was untimely because it was not "pending" for purposes of AEDPA's statute of limitations for the 14 days between August 17 (when the PLA was originally due) and September 1 (the day Griffith filed his Motion for Leave to File the PLA *Instanter*). The State asserted that it "inadvertently overlooked" this timeliness issue. Over Griffith's objection that the State was 22 months late in filing its motion to dismiss, the district court granted leave to file the motion to dismiss.

In opposition to the motion, Griffith explained that because leave to file *instanter* was granted, his

PLA was timely under established Illinois law. Griffith also reiterated that he was actually innocent because the new evidence presented during his post-conviction proceedings showed that the State's three "eyewitnesses" testified falsely at trial. Griffith supported his claim of actual innocence with sufficient indicia of reliability through, among other things, the uncontroverted affidavit of the lawyer for one of the State's witnesses attesting to the fact that there existed an undisclosed *quid pro quo* agreement between the witness and prosecutor. (JA163-64.) The district court nevertheless dismissed Griffith's petition as untimely.[4]

Ignoring Illinois case law demonstrating that Griffith's PLA was indeed timely under state law – and therefore should have been considered "pending" for the purpose of the statute of limitations – the district court determined that *Carey v. Saffold*, 536 U.S. 214 (2002), was inapplicable because *Carey* only applied to a timely filed state post-conviction petition. The district court denied Griffith's motion for reconsideration on June 4, 2009 and denied

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[4] As three Seventh Circuit judges noted in their dissent from the decision denying *en banc* review, the district court ironically exercised its discretion to allow the state's 22 month late assertion of the statute of limitations defense, giving the State's motion full retroactive effect, "which allowed a new defense based on *not* giving retroactive effect to the state court's decision to grant an earlier retroactive extension of time." (App. 10a.)

Griffith's Application for a Certificate of Appealability on June 12, 2009. (App. 20a-26a, 143a-45a.)

C. Proceedings Before The Seventh Circuit.

1. Certificate of Appealability.

The Seventh Circuit granted a Certificate of Appealability, permitting Griffith to brief the timeliness issues and finding that "Griffith has made a substantial showing of the denial of his constitutional rights, including the denial of his right to due process, violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and deprivation of effective assistance of trial and appellate counsel." (App. 141a-42a.)

2. The Seventh Circuit Opinion.

The Seventh Circuit affirmed the district court decision that Griffith's federal habeas petition was untimely. (App. 13a-19a.) According to the court, the Illinois Supreme Court decision granting Griffith leave to file his PLA *instanter* did "not have retroactive effect" for the purpose of federal law. (App. 17a.) The Seventh Circuit stated that whether the proceeding was "pending" for the 14 days was a question of federal law, and that *nothing* the Illinois Supreme Court did – or could do – would render the PLA "pending" during that 14-day period. (App 17a.)

With regard to Griffith's "actual innocence" contention, the Seventh Circuit – relying on its opinion in *Escamilla v. Jungwirth*, 426 F.3d 868 (7th Cir. 2005) – reaffirmed that even where a habeas petitioner presents a credible showing of actual innocence, he is nevertheless subject to AEDPA's time limitations. (App 18a.)

3. The Dissent to the Order Denying Rehearing *En Banc*.

Griffith filed a petition for rehearing or rehearing *en banc*, asserting in relevant part that the Seventh Circuit's decision: (a) was in direct conflict with this Court's decisions in *Carey*, 536 U.S. 214, and *Evans v. Chavis*, 546 U.S. 189 (2006), (b) was inconsistent with other Seventh Circuit decisions and the decisions of other circuits requiring federal courts to look to state law to determine whether a state post-conviction petition is timely and pending, and (c) improperly substituted its own incorrect interpretation of Illinois law when it concluded that Griffith's PLA to the Illinois Supreme Court was not timely.[5]

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[5] Griffith later suggested via a letter filed pursuant to Federal Rule of Appellate Procedure 28(j) that, if the Seventh Circuit had any question or doubt about the meaning of the state procedures, the Seventh Circuit could certify to the Illinois Supreme Court the question of whether the "instanter" order made the PLA timely under

The panel denied the petition for rehearing and a majority of the court did not favor rehearing *en banc*. (App. 1a-2a.) However, three judges dissented from the denial of rehearing *en banc*. (App. 2a-12a)

The dissent properly states that under this Court's dictates in *Carey* and *Evans*, federal courts are required to "give the state court's decision on timeliness the same effect the state courts did." (App. 3a.) The dissent also concludes that correcting the panel's erroneous ruling deserved *en banc* consideration "because the general problem – the proper calculation of the federal limitations period when a petitioner has missed a deadline in the state courts, but the state courts have excused the delay – is a recurring issue in the district courts and for us." (App. 3a.)

Specifically, the dissent identified three errors in the panel's conclusion that there was nothing actually "pending" during the 14 days at issue and therefore the statute of limitations was not tolled for that time period:

> First, the conclusion is inconsistent with the reasoning of the Supreme Court in *Carey* and its follow-up case, *Evans v. Chavis*, 546 U.S. 189 (2006), and more generally with the Supreme

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state law. The Seventh Circuit did not act upon this request.

> Court's approach to a closely-related question in *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009).
>
> Second, the panel conclusion produces a confusing solution that sets unnecessary traps for unwary petitioners and their lawyers.
>
> Third, the panel conclusion winds up being over-protective of a state's interests when the state court has found no need for such protection.

(App. 4a-5a.)

According to the dissent, the better approach is that "when a state court deems timely a request for further appellate review, the federal courts should treat the relevant state court petition as having been pending throughout the entire period of state court review, without having to go back and look for potential 'gaps' in the state courts' process." (App 5a.)

With regard to Griffith's request that the Seventh Circuit decide *en banc* whether a demonstration of "actual innocence" requires review of the merits of his habeas claim without regard to AEDPA's statute of limitations, the dissent stated that there is already a circuit split on the question and the "issue is now ripe for Supreme Court resolution." (App. 12a.)

REASONS FOR GRANTING THE PETITION

This case presents the opportunity for this Court to address two important and recurring issues on which the Seventh Circuit's positions conflict with this Court's prior decisions, as well as the decisions of other circuits.

First, the Seventh Circuit decision regarding the important relationship between "timeliness" and "pendency" under AEDPA is incorrect and conflicts directly with this Court's decisions in *Carey*, 536 U.S. 214 and *Evans*, 546 U.S. 189. The Seventh Circuit's holding also conflicts with the approach taken by other circuits: federal courts must accept a state court's interpretation of its own rules. The Seventh Circuit's holding improperly permits federal courts to substitute their own interpretation of state rules on timeliness. Also, as noted by the dissent of the three judges who voted to grant rehearing *en banc*, the Seventh Circuit's opinion sows confusion for federal habeas petitioners attempting to ascertain when their statute of limitations begins, potentially lapses, resumes, and ultimately ends.

Second, even if Griffith's habeas petition were untimely, this case squarely raises the issue – upon which the circuits have split – of whether a petitioner who demonstrates a credible claim of actual innocence is entitled to review of the merits of his habeas claim regardless of AEDPA's statute of limitations. The Seventh Circuit's decision that an untimely habeas petition does not warrant review on

the merits even where the petitioner makes a credible claim of actual innocence directly conflicts with the holdings of the Sixth and Tenth Circuits. Because Griffith presents in his habeas petition a credible claim of actual innocence under the standard of *Schlup v. Delo*, 513 U.S. 298 (1995), the district court should have reached the merits (or at least permitted discovery and an evidentiary hearing), regardless of the timeliness of Griffith's petition.

I. This Court Should Grant Review To Clarify That State Law – Not Federal Law – Determines Whether State Court Proceedings Were "Timely" And Therefore "Pending" For The Purpose Of AEDPA's Statute Of Limitations.

AEDPA's one-year statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). To determine whether an application for post-conviction relief was "pending" in state court, this Court has ruled that federal courts must determine whether the petition was "properly filed" and "timely" under state law. *Evans*, 546 U.S. at 198; *Carey*, 536 U.S. at 226.[6]

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[6] The Seventh Circuit properly ruled – and there is no dispute – that Griffith's PLA was "properly filed" (App. 18a)

The Seventh Circuit decision here directly conflicts with this Court's dictates in *Carey* and *Evans*. The Seventh Circuit essentially says that it does not matter if the Illinois Supreme Court granted a retroactive extension of time and considered the PLA timely, because no matter what the state court did, the proceedings were not "pending" for the 14 days between the PLA's original due date and the day he sought leave to file the PLA *instanter*. (App. 16a-17a.) This departure from the dictates of *Carey* and *Evans* abandons the principles of comity and federalism that are at the heart of AEDPA. The Seventh Circuit reasons that "[t]he meaning of 'pending,' a term in a federal statute, is a question of federal law," and thus federal courts have the ability to interpret state law in a way that conflicts with the State's own interpretation. (App. 17a.) Because the Seventh Circuit decided this important federal question in a way that conflicts with the relevant decisions of this Court and other circuits, certiorari should be granted.

A. Supreme Court review is necessary to clarify that federal courts must apply state timeliness rules to determine whether a state post-conviction petition remained "pending."

The purpose of AEDPA's time limitation is to give the state courts the opportunity to address claims before a petitioner turns to the federal courts for relief. As the dissenting judges noted, federal courts must "give the state court's decision on timeliness the same effect the state courts did" to determine

whether a post-conviction petition remains pending for the purpose of AEDPA's statute of limitations. (App. 3a.) The Seventh Circuit, however, ignored the Illinois Supreme Court rules and decisions and concluded that nothing the Illinois Supreme Court did could make Griffith's PLA timely.[7] (App. 16a-17a.) The Seventh Circuit's failure to defer to state law and its hyper-technical reading of the word "pending" creates an anomalous system under which a petitioner could have a state post-conviction petition pending in the Illinois Supreme Court while his time to file a federal habeas petition is simultaneously running out.

The Seventh Circuit stated:

> According to Griffith, leave to file *instanter* means that the petition is timely as a matter of state law. That is not what the state court said, however. A decision to accept a document *instanter* (law Latin for "right now" or "immediately") does not make it timely; it just means that the document will be considered on the merits.

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[7] The Seventh Circuit also ignored the Illinois Supreme Court's docket sheet demonstrating that the PLA was ultimately due and filed on September 13, 2005 – the day the court granted leave to file *instanter*.

(App. 16a.) This statement totally disregards Illinois law. In ruling on Griffith's motion for leave to file *instanter*, the Illinois Supreme Court said, "Motion allowed." (App. 152a.) There was no need for the Illinois Supreme Court to state explicitly that the petition was timely because under established Illinois law, allowing the motion for leave to file *instanter* meant that it was timely.

As the dissent explained, under *Carey* and *Evans*, the issue is "whether Griffith's appeal was actually timely under state law." (App. 7a (internal citations omitted).) It was. Illinois Supreme Court Rule 315 – the Rule that sets the time limit to file a PLA – provides that the court, "or a judge thereof, on motion, may extend the time for petitioning for leave to appeal . . . in the most extreme and compelling circumstances." Ill. Sup. Ct. Rule 315(b)(1). Griffith's counsel – who had been ill – filed his motion for leave to file the PLA *instanter* under Rule 315(b). (App. 146a-151a.) Significantly, it is well established under Illinois law that the Supreme Court may grant leave to file *instanter*. *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP*, 828 N.E.2d 216, 221 (Ill. 2005); *Pitsch v. Cont'l & Commercial Nat. Bank of Chicago*, 305 Ill. 265, 267 (1922). In *Pitsch*, the Illinois Supreme Court held that where the appellant sought leave to file an appeal bond *instanter*, "the order approving the filing of the appeal bond and permitting it to be filed was in effect an extension of the time for filing the bond." 305 Ill. at 267.

In defining the period when a state court proceeding is "pending" under AEDPA, the Seventh Circuit stated that "state courts' decisions do not have retroactive effect." (App. 17a.) At the same time, the court specifically conceded that under Illinois law, Illinois courts do issue orders whose effect is to retroactively fill gaps caused for any number of reasons.[8] (App. 17a.) For example, in *Wauconda*, the Illinois Supreme Court explained that an extension under Rule 315(b)(1) may be made retroactively by granting leave to file a PLA *instanter*. 828 N.E.2d at 221 (citing 177 Ill.2d R. 315(b)). According to the Illinois Supreme Court, by granting leave to file *instanter*, it extends a party's deadline for filing its PLA. *Id.* The Illinois Supreme Court concluded that "the *extension* was appropriate" and the case was "properly before this court." *Id.* at 223 (emphasis added). This preserved the Illinois Supreme Court's jurisdiction to hear the appeal in *Wauconda*. *Id.*

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[8] The Seventh Circuit wrongly concluded that a decision by the Illinois Supreme Court to accept a late filing and a decision to grant leave to file *instanter* are identical. (App. 17a.) As a jurisdictional matter, the Illinois Supreme Court distinguishes between a late-filed PLA and a PLA filed *instanter*. *Wauconda*, 828 N.E.2d at 223. That is, the court has the power to dismiss the late-filed PLA on jurisdictional grounds, but does not have that power when the court grants leave to file the PLA *instanter*. *Id.*

Where, as here, the state court has a procedure to give retroactive effect to its decisions, the federal courts must give the same effect to the state decision when calculating timeliness. Because the state court deemed Griffith's PLA timely, under *Carey* and *Evans* it remained pending until the Illinois Supreme Court denied his PLA on the merits on December 5, 2005.

As this Court previously explained, "[i]f the filing of the appeal is timely, the period between the adverse lower court decision and the filing . . . is not counted against the 1-year AEDPA time limit." *Evans*, 546 U.S. at 192. The Seventh Circuit's conclusion to the contrary makes it apparent that clarity on this issue is still necessary. Accordingly, this Court should grant review to clarify that federal courts must look to a state's interpretation of its own law to determine whether a state court filing was timely filed.[9]

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[9] We respectfully suggest that the Court might make best use of its finite resources by granting certiorari, summarily vacating the opinion of the Seventh Circuit, and remanding with instructions that Griffith's petition be considered on its merits. S. Ct. Rule 16.1. Alternatively, if the Court believes there is *any* question regarding the timeliness of the PLA under Illinois law, this Court may consider certifying the question to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 20. *See Zant v. Stephens*, 456 U.S. 410, 416-17 (1982) (certifying a question of Georgia law to the

B. The Seventh Circuit's decision negating the ability of the Illinois Supreme Court to determine the "timeliness" of state filings conflicts with the approach taken by other circuits.

Each state has its own – sometimes unique – rules for the filing of pleadings and briefs. The Seventh Circuit's holding that the Illinois Supreme Court's determination that *instanter* filings cannot have retroactive effect for the purpose of AEDPA's statute of limitations conflicts with the approach taken by other circuits which defer to state court determinations of their own rules.

The Eighth Circuit has recognized that whether a petitioner's state court appeal was "pending" for purposes of AEDPA's statute of limitations is a matter of federal law, but, in contrast to the Seventh Circuit, that federal law requires examination of the state court procedures. *Payne v. Kemna*, 441 F.3d 570, 571 (8th Cir. 2006); *see Drew v. MacEachern*, 620 F.3d 16, 21 (1st Cir. 2010) ("a state's procedural rules control whether an application for state post-conviction relief is pending under §2244(d)(2)"). Likewise, the Sixth Circuit has held that "federal courts must accept a state court's interpretation of

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Georgia Supreme Court); Eugene Gressman et al., *Supreme Court Practice* 604 (9th ed. 2007); 1A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1:676 (L. Ed. 2010).

its statutes and its rules of practice." *Israfil v. Russell*, 276 F.3d 768, 771 (6th Cir. 2001); *see also Jenkins v. Johnson*, 330 F.3d 1146, 1155 (9th Cir. 2003) *overruled on other grounds by Pace v. DiGuglielmo*, 544 U.S. 408 (2005). The Tenth Circuit has properly held "in the interest of comity and due deference . . . state law must determine when a state habeas petition is considered filed." *Adams v. LeMaster*, 223 F.3d 1177, 1181 (10th Cir. 2000); *see also Wade v. Battle*, 379 F.3d 1254, 1260-61 (11th Cir. 2004) (deferring to the Georgia Supreme Court's determination that the petitioner's application for review was not "properly filed"); *Merritt v. Blaine*, 326 F.3d 157, 165-66 (3d Cir. 2003) (deferring to the state court's holding that the post-conviction petition was untimely and therefore not properly filed under AEDPA); *Adeline v. Stinson*, 206 F.3d 249, 253 (2d Cir. 2000) (deferring to state law).

Similarly, in *Causey v. Cain*, 450 F.3d 601, 606 (5th Cir. 2006), the Fifth Circuit recognized the inconsistency that would result if it declined to apply state court interpretations of its filing deadlines: "we could be forced to hold that the time for state direct review had expired even where the Louisiana Supreme Court has explicitly held that a defendant's application for direct review was timely filed as a matter of state law."

The Seventh Circuit itself has recognized in other cases that the Illinois Supreme Court is the "master of its own rules" and that whether a state pleading is timely is governed by those rules. *Wilson v. Battles*,

302 F.3d 745, 747 (7th Cir. 2002) ("The issue of whether a post conviction petition is pending for habeas purposes is governed by state law."); *Jefferson v. Welborn*, 222 F.3d 286, 288 (7th Cir. 2000).[10] But here, the Seventh Circuit abandoned this principle in a purported attempt to create a federal law of "pendency," stating: "[t]he meaning of 'pending,' a term in a federal statute, is a question of federal law." (App. 17a.) It is from this statement that the court concluded that state court decisions cannot have retroactive effect. (App. 17a.) Although "pending" is a term in a federal statute – as is the term "properly filed" – federal courts must look to state law to determine whether a post-conviction petition is timely and "properly filed." If it is, it remains "pending" through the conclusion of the state proceedings. *Carey*, 536 U.S. at 220-21; *see Allen v. Mitchell*, 276 F.3d 183, 185 (4th Cir. 2001).

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[10] There is similar confusion within a number of other circuits. For example, the Eighth Circuit has held both that examination of state court procedures is necessary to determine when a post-conviction petition is pending, and that independent review by federal courts without regard to state rulings is appropriate. *Compare Payne*, 441 F.3d at 571-72 (deferring to state court procedures to determine when the state post-conviction petition was pending), *with Lewis v. Norris*, 454 F.3d 778, 780 (8th Cir. 2006) (even where a state court treats a state petition as timely, federal courts are to determine independently whether the state court proceedings were timely).

By declining to give proper effect and respect to Illinois law on timeliness and procedure, the Seventh Circuit conflicts with the other circuits. Accordingly, the issue of whether federal courts must look to state law to determine if a post-conviction petition remains "pending" for the purpose of AEDPA's statute of limitations is appropriate for Supreme Court resolution.

C. Applying a state's interpretation of its own timeliness rules is necessary to provide clarity to federal habeas petitioners.

The Seventh Circuit's decision undermines AEDPA's guiding principles of comity and federalism, and throws the law regarding the statute of limitations into a state of disarray. *See Carey*, 536 U.S. at 222. The Seventh Circuit deprives Illinois courts of the respect they are due and allows federal courts to decide for themselves – after-the-fact and contrary to state law – whether a state post-conviction petition was timely and therefore pending. This makes it extremely difficult for a habeas petitioner to know in advance of filing his habeas petition what time will be counted against him. That is, will the federal court follow the state court's interpretation of its procedural rules, or will it (as the Seventh Circuit did here) make up its own rules?

Under the Seventh Circuit's reasoning, habeas petitioners like Griffith find themselves in a difficult and confusing situation. As explained in the dissent, the court's decision "sets unnecessary traps for

unwary petitioners and their lawyers" such that they have to go back through and dissect the state post-conviction process to look for potential "gaps" during which the statute of limitations may not have been tolled. (App. 5a.)

Adding to the confusion is the fact that the Seventh Circuit follows state law in certain instances but declines to do so in others. Although the Illinois rule with respect to the filing of a brief *instanter* may be unique, there are many ways in which state court rules on timeliness come into play in the federal habeas context. For example, when determining the timeliness of a state court filing involving the "mailbox rule" (which deems a prisoner's petition filed on the day he delivers it to prison officials), federal courts, including those in the Seventh Circuit, usually defer to the law of the state.[11] Some states – including Illinois[12] – apply the mailbox rule,

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[11] Further adding to the confusion is the fact that two circuits – the Second and Ninth – often (but not always) apply the *federal* mailbox rule to the state filings regardless of state law. *See, e.g., Fernandez v. Artuz*, 402 F.3d 111, 115 (2d Cir. 2005) ("New York's rejection of the mailbox rule does not preclude its application by a *federal* court in tolling a *federal* statute of limitations.") (emphasis original); *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000) (federal mailbox rule also applied to state habeas petitions).

[12] *Sims v. Acevedo*, 595 F. 3d 774, 777 (7th Cir. 2010) (applying Illinois' mailbox rule)

but others – like New Mexico[13] – do not. Other states employ "mandate" rules,[14] successive petition procedures,[15] "gatekeeper justice" rules,[16] and "escape clause" procedures.[17] In each instance, federal courts give a high degree of respect and deference to the state rules and if the state rules make the filings timely, they are pending for

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[13] *Adams*, 223 F.3d at 1182 (declining to apply the mailbox rule because New Mexico law did not appear to recognize the rule)

[14] *Compare Wilson*, 302 F.3d at 747 (explaining that the petitioner was not entitled to tolling for the days after his PLA was denied but before the mandate issued because Illinois did not apply the mandate rule), *with Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (providing petitioner with the benefit of the days between the denial of his post-conviction petition and the date the mandate issued because Florida recognized the mandate rule).

[15] *Israfil*, 276 F.3d at 771 (habeas petition was properly denied where petitioner failed to comply with Ohio's successive petition requirements).

[16] *Currie v. Matesanz*, 281 F 3d 261, 271 (1st Cir 2002) (habeas claim was timely filed because Massachusetts' requirement that the petitioner apply to a gatekeeper justice for an appeal had no time limit).

[17] *Jenkins*, 330 F.3d at 1151-52 (petition was timely filed because state law contained an "escape clause" for claims that could not reasonably have been raised in an original or amended petition).

purposes of AEDPA until the conclusion of the state proceedings. That is what comity and federalism require.

Habeas petitioners must be able to rely on the fact that the federal court will follow the law of the petitioner's state. By looking for potential "gaps" in the post-conviction process after-the-fact, the Seventh Circuit created an unmanageable system. If, for example, the next petitioner in Griffith's position obtains from the Illinois courts an order granting leave to file his PLA *nunc pro tunc*, will another panel of the Seventh Circuit distinguish this case and hold that his petition was indeed "pending" under AEDPA? It is necessary for habeas petitioners and their counsel to be able to determine their federal filing deadlines without risk that state court orders will be reinterpreted *ex post facto*.

As the dissent stated, the Seventh Circuit should have looked to whether the state court treated the state filings as timely, and if it did, then the state post-conviction proceedings remained "pending." (App. 5a.) Not only does this properly balance "the interests served by the exhaustion requirement and the limitation period," *Duncan v. Walker*, 533 U.S. 167, 179 (2001), but it treats the state appellate process as a complete entity, thereby preventing the uncertainty about which the dissent warns. *See Carey*, 536 U.S. at 220; (App. 9a-11a.)

This Court should grant review to remove the confusion created by the Seventh Circuit's opinion.

II. Supreme Court Review Is Necessary To Resolve The Conflict In The Circuits Concerning Whether A Court Should Address The Merits Of An Otherwise Untimely Habeas Petition Where The Petitioner Establishes A Credible Claim Of Actual Innocence.

A. Review on the merits of the underlying constitutional issues in an otherwise untimely habeas petition is appropriate where the petitioner demonstrates a credible claim of actual innocence.

The circuits are in conflict on the issue of whether a petitioner who presents a credible claim of actual innocence is entitled to review on the merits of his underlying constitutional claims even where he fails to meet the timeliness requirement of AEDPA. Indeed, the dissent below states that this "issue is now ripe for Supreme Court resolution." (App. 12a.)

The Seventh Circuit, relying on its decision in *Escamilla*, 426 F.3d at 871, reaffirmed that a habeas petitioner who demonstrates actual innocence cannot overcome his failure to comply with AEDPA's one-year limitations period. (App. 18a.)

The Seventh Circuit's decision conflicts directly with decisions of the Sixth and Tenth Circuits. In *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005), the Sixth Circuit found that where a petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty based on his showing of actual innocence, he should be

permitted to argue the merits of his underlying constitutional claims. The Sixth Circuit recognized the constitutional issues raised by absolute foreclosure of habeas relief to a man who is actually innocent and referenced decisions from other circuits acknowledging the serious constitutional problems raised by "denying federal habeas relief from one who is actually innocent." *Id.* at 601 (citing cases from the Second, Third, and Eleventh Circuits).

In reaching this result, the Sixth Circuit noted that it was parting company with the Eighth Circuit's decision in *Flanders v. Graves,* 299 F.3d 974, 976-78 (8th Cir. 2002):

> We decline to adopt the approach outlined by the Eighth Circuit in *Flanders*, which imposes a requirement that the petitioner show "action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion or . . . that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations." 299 F.3d at 978 . . . The *Flanders* exception would not cover situations as in this case where the petitioner had collected sufficient evidence to demonstrate a credible claim of actual innocence but failed to file within the one-year limitations period.

Souter, 395 F.3d at 601 n.16.

More recently, the Tenth Circuit ruled that "in the equitable tolling context . . . a sufficiently supported claim of actual innocence creates an exception to procedural barriers for bringing constitutional claims, regardless of whether the petitioner demonstrated cause for the failure to bring these claims forward earlier." *Lopez v. Trani*, No. 10-1088, __F.3d__, 2010 WL 4923891, at *3 (10th Cir. Dec. 6, 2010). The Tenth Circuit concluded that where "a petitioner argues that he is entitled to equitable tolling because he is actually innocent, this argument is premised on the same fundamental miscarriage exception that was discussed by the Supreme Court in *Schlup* and *Coleman* . . . ." *Id.* *But see Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (tolling appropriate "when prisoner is actually innocent" and "diligently pursue[s] his federal habeas claims").

Other circuits that have addressed the issue have held that the actual innocence standard does not apply to AEDPA's limitations period, or, like the Seventh Circuit, does not apply in the absence of a showing of diligence or cause for the delay. *See Lee v. Lampert*, 610 F.3d 1125, 1134 (9th Cir. 2010) (discussing circuit split); *David v Hall*, 318 F.3d 343, 347 (1st Cir. 2003) (habeas petitioners "who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming").

B. The Seventh Circuit's refusal to review the merits of a habeas claim where the petitioner makes a credible showing of actual innocence is wrong for the reasons set forth in *Schlup v. Delo*, 513 U.S. 298 (1995).

Prior to the enactment of AEDPA, this Court held that a claim of actual innocence can be raised to avoid a procedural bar to the consideration of the merits of the habeas petitioner's constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "[T]he individual interest in avoiding injustice" reflects a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 324-25 (internal quotations omitted). Contrary to the reasoning of the First, Seventh, and Ninth Circuits, this Court has reaffirmed that the *Schlup* gateway applies even to procedurally defaulted claims to avoid "manifest injustice." *House v. Bell*, 547 U.S. 518, 536-37 (2006) (procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration") (internal quotations omitted).

In *Schlup*, this Court held that where a habeas petitioner presents evidence of his "innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." 513 U.S. at 316. The threshold inquiry is whether "new facts raise[] sufficient doubt

about [the habeas petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is *more* likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

Griffith's case is the rare case contemplated in *Schlup* where the petitioner has presented evidence raising sufficient doubt about his guilt so as to undermine confidence in the result of his trial. The sole evidence at trial supporting Griffith's conviction for first degree murder was the "eyewitness" testimony of three inmates who testified that Griffith was the initial aggressor during the fight. During the post-conviction proceedings, all three "eyewitnesses" recanted their trial testimony and attributed their false trial testimony to repeated pressure, coercion, and promises of benefits and leniency from the State.[18] (PCR. 156-64, 183-84, 215-16, 222, 232, 244, 255-61, 279-83.) Without the

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[18] The post-conviction trial court and the Illinois Appellate Court wrongly denied Griffith's claim with respect to the recanted testimony because each court improperly required the recanted testimony to affirmatively prove that Griffith acted in self defense. (JA177, 324-25.) The recanted testimony instead demonstrated that none of the State's eyewitnesses actually saw the events to which they testified at trial. (PCR. 150-51, 194, 251, 264-65, 286.)

testimony of these three witnesses, the State had *no* evidence to support a first degree murder conviction.

Not only was the trial testimony of the State's "eyewitnesses" false, but the State failed to disclose material evidence relating to the benefits and leniency provided in exchange for the false testimony. The new evidence presented by Griffith, including the affidavits and testimony from each "eyewitness," is supported by sufficient indicia of reliability in the form of records from the IDOC master file of one of the witnesses – Bernie Cleveland – confirming he was released early from prison despite his perpetual disciplinary problems.[19] (PCC. 1167.) More importantly, Griffith presented the uncontroverted affidavit from Cleveland's counsel attesting to the fact that there existed a *quid pro quo* agreement between Cleveland and the prosecutor in Griffith's case. (JA163-64.) Griffith therefore satisfies *Schlup*'s "more likely than not" standard. *See Souter*, 395 F.3d at 593 n.8 ("A prosecution witness recanting his trial testimony certainly falls under that scope" of the *Schlup* standard); *see also Schlup*, 513 U.S. at 330 ("the

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[19] The post-conviction trial court inexplicably denied Griffith's motion to review the IDOC files for the State's other two witnesses. (PCC. 155-57, PCR. 310-13.) In the district court, Griffith filed a Conditional Motion for Discovery and/or an Evidentiary Hearing seeking, among other things, review of the IDOC files of the State's other two witnesses. The district court denied the motion

newly presented evidence may indeed call into question the credibility of the witnesses presented at trial").

The discrete question concerning the effect of actual innocence on AEDPA's statute of limitations will not be resolved by additional debate among the Circuits. Accordingly, this Court should grant review and resolve the conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2518

EVAN GRIFFITH,
Petitioner-Appellant,

v.

DAVE REDNOUR, Warden,
Menard Correctional Center,

Respondent-Appellee.

On Petition for Rehearing and
Rehearing En Banc

DECIDED OCTOBER 28, 2010

Before EASTERBROOK, *Chief Judge*, and BAUER and WOOD, *Circuit Judges*.

PER CURIAM. The panel has voted unanimously to deny the petition for rehearing. A

judge in active service called for a vote on the suggestion for rehearing en banc. A majority did not favor rehearing en banc, and the petition therefore is denied.

Circuit Judges Rovner, Williams and Hamilton voted to rehear the appeal en banc.

HAMILTON, *Circuit Judge*, with whom ROVNER and WILLIAMS, *Circuit Judges*, join, dissenting. Petitioner Griffith presented his constitutional claims to the Illinois courts, which rejected them without a majority opinion. *People v. Griffith*, 634 N.E.2d 1069 (Ill. 1994). Griffith's death sentence for murder was later commuted to a life sentence in prison. After exhausting his available remedies in postconviction proceedings in the state courts, Griffith sought federal habeas relief. The district court denied relief on the ground that Griffith had filed his federal petition about two weeks too late under the federal habeas statute of limitations, 28 U.S.C § 2244(d). The panel has affirmed, *Griffith v. Rednour*, 614 F.3d 328 (7th Cir. 2010), and a majority of the court has voted to deny rehearing en banc.

I respectfully dissent from the denial of rehearing en banc. The Illinois Supreme Court granted Griffith permission to file an otherwise-untimely petition for leave to appeal a denial of post-conviction relief because Griffith's lawyer was too ill to come to work. The panel held that the Illinois Supreme Court's decision to allow the filing did not toll the statute of limitations for filing a federal habeas corpus petition for the two weeks between the

expiration of the filing deadline and the filing of Griffith's motion for leave to file the late petition.

Based on the Supreme Court's interpretation of the tolling provision in 28 U.S.C. § 2244(d)(2), I believe that this conclusion was wrong. The federal courts should give the state court's decision on timeliness the same effect the state courts did. Correcting this error deserves en banc consideration because the general problem—the proper calculation of the federal limitations period when a petitioner has missed a deadline in the state courts, but the state courts have excused the delay—is a recurring issue in the district courts and for us.

The problem is one of the intricate details arising from Congress's decision in 1996 to establish a one-year statute of limitations for seeking habeas corpus relief in federal court. See 28 U.S.C. § 2244(d)(1). That time is tolled for the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2) In this case, petitioner Griffith sought post-conviction relief in the Illinois state courts. As the panel opinion explains, the Illinois Appellate Court affirmed the denial of that relief on July 13, 2005. Griffith actually filed on August 1st a "notice of intent to file petition for leave to appeal," and under the rules then in effect, he then had until August 17th to file his petition for leave to appeal with the Illinois Supreme Court. Griffith missed that deadline. On September 1st, though, Griffith filed a petition for leave to appeal, along with a

motion for leave to file that petition instanter. The motion explained that his lawyer in the state appellate public defender's office had been ill.

Over the state's objection, the Illinois Supreme Court granted Griffith's motion on September 13th. The court then considered Griffith's petition on the merits and denied it on December 1, 2005. Griffith filed his federal petition 364 days later, on November 30, 2006. Application of the one-year deadline in section 2244(d)(1) therefore depends on whether we treat Griffith's petition for leave to appeal as "pending" between the August 17th expiration of the time to file the petition and either his September 1st filing or the state court's September 13th grant of leave to file instanter.

The panel opinion concludes that there was nothing actually "pending" during that interim period, see 614 F.3d at 330, quoting and following *Fernandez v. Sternes*, 227 F.3d 977, 980 (7th Cir. 2000). The conclusion is certainly understandable. It is consistent with the reasoning that four dissenting justices of the Supreme Court found persuasive in *Carey v. Saffold*, 536 U.S. 214 (2002). But I believe the panel conclusion is wrong for three reasons:

> – First, the conclusion is inconsistent with the reasoning of the Supreme Court in *Carey* and its follow-up case, *Evans v. Chavis*, 546 U.S. 189 (2006), and more generally with the Supreme Court's approach to a closely-related

question in *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009).

– Second, the panel conclusion produces a confusing solution that sets unnecessary traps for unwary petitioners and their lawyers.

– Third, the panel conclusion winds up being over-protective of a state's interests when the state court has found no need for such protection.

The better approach here would be to follow the reasoning of *Carey* and *Evans* to hold that when a state court deems timely a request for further appellate review, the federal courts should treat the relevant state court petition as having been pending throughout the entire period of state court review, without having to go back and look for potential "gaps" in the state courts' process.

1. *The Supreme Court's Decisions in Carey v. Saffold and Evans v. Chavis*

The specific problems addressed in *Carey* and *Evans* stemmed from an unusual feature of California's post-conviction procedure. Rather than taking an "appeal" from a trial court's denial, the petitioner files a new original petition in the appellate court, and if that is denied, files a new original petition in the state supreme court. There are no specific deadlines, though; California requires only that the later petition be filed within a reasonable time after denial of the earlier The question in Carey was whether the federal clock was

tolled in the period between the appellate court's denial of relief and the filing of the later petition with the state supreme court. The Court stated the general rule: "an application [for post-conviction relief] is pending as long as the ordinary state collateral review process is 'in continuance'—*i.e.*, 'until the completion of' that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.' " *Carey*, 536 U.S. 214, 220 (2002). In *Carey*, the Court remanded to the Ninth Circuit to figure out whether the state courts had treated the petition as timely: If the California court had clearly ruled that the delay in filing had been unreasonable, "that would be the end of the matter." 536 U.S. at 226. But if the state court had treated the filing as timely, then the federal claim would have been timely as well. The Supreme Court remanded the case to the Ninth Circuit to clarify what the state court had actually decided. *Id.*

To the extent that *Carey* left any doubt as to whether state law controls any pendency analysis under the habeas tolling provision, *Evans* dispelled that doubt. "The time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law." *Evans v. Chavis*, 546 U.S. 189, 191 (2006) (emphasis in original). "If the filing of the appeal is timely, the period between the adverse lower court decision and the filing . . . is not

counted against the 1-year AEDPA time limit." *Id.* at 192.[1]

Under *Carey* and *Evans*, then, the issue here is whether Griffith's appeal was actually timely under state law. *Evans*, 546 U.S. at 197. At first blush, Griffith's appeal might seem untimely. Illinois Supreme Court Rule 315 then set a 35-day time limit to file a PLA, and Griffith admittedly failed to file within that time. But the state court "may extend the time for petitioning for leave to appeal" on a party's motion "in the most extreme and compelling circumstances." That's what the Illinois court did when it granted Griffith leave to file his PLA. See *Waucanda Fire Protection Dist. v. Stonewall Orchards, LLP*, 828 N E 2d 216, 220 (Ill. 2005) ("[A]n order was entered granting the County's motion [for leave to appeal instanter], the effect of which was to extend the County's deadline for filing its petition for leave to appeal . . . ."); *id* at 223 (referring to the grant of the motion for leave to file as an "extension"). (I agree with the panel's observation that, for federal habeas purposes, there is no difference under Illinois law between acceptance "instanter" and an extension of the time for filing the petition. 614 F.3d at 330. I draw the opposite conclusion from that observation, however.)

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[1] The panel tried to distinguish Carey as having dealt only with whether the petition was "properly filed" under 28 U.S C § 2244(d)(2), and not with whether it was "pending " Carey and Evans themselves do not support the distinction See Carey, 536 U S at 217 ("This case raises three questions related to the statutory word 'pending' ")

In other words, the state supreme court deemed Griffith's PLA timely for purposes of state law. Under *Carey* and *Evans*, that action should have tolled the federal limitations period for Griffith during the two-week gap, as well as the rest of the time his case was pending in the state courts. Under this reasoning, Griffith's federal petition was timely.

The panel in this case and the panel in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), rejected the idea that a state court's allowance of a late filing could have the retroactive effect of making the state court case "pending" (for federal purposes) during such gaps in the state court proceedings. Yet the Supreme Court in *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009), authorized an even greater retroactive "re-set" under section 2244(d). The question in *Jimenez* was when the state courts' direct review of a conviction became final for purposes of section 2244(d)(1). After the petitioner's initial appeal had concluded, he sought state post-conviction relief. The state courts ordered that he be allowed to pursue a second out-of-time appeal because he had not been kept informed by his lawyer or the state courts about his first appeal. The issue for the Supreme Court was whether the date of final decision was the conclusion of the first appeal or the second out-of-time appeal The Court held that the second appeal was the relevant one: "once the [state court] reopened the direct review of petitioner's conviction on September 25, 2002, petitioner's conviction was no longer final for purposes of § 2244(d)(1)(A). Rather, the order 'granting an out-of-time appeal restore[d] the pendency of the direct

appeal.'" 129 S. Ct. at 686. In other words, the state courts' actions had the retroactive effect of making what had once been a final decision by the state courts no longer final for federal purposes.

From *Jimenez*, as well as *Carey* and *Evans*, I conclude that when a state court decides to excuse a criminal defendant's failure to meet state court deadlines, the federal courts should give the same retroactive effect to that state court decision when calculating timeliness under section 2244. It's the fair thing to do, and it's consistent with the language and purpose of the statute.

2. *Practical Considerations*

The panel's decision not to give federal effect to a state court's decision to grant a retroactive extension of time in state court will produce unnecessary confusion and lay traps for unwary petitioners and their lawyers in an area that is already complex enough and provides ample protection against stale claims. When petitioners and their lawyers try to figure out their federal filing deadline, rather than focusing on the start and end of the entire state court post-conviction proceedings, they will also need to review every stage of the docket to look for "gaps" during which the federal courts will conclude that nothing was actually "pending" in the state courts.

That is a problem. Under the panel's approach, the decisive fact will not be whether the state court actually granted an extension of time, but whether the petitioner sought the extension before or after the relevant deadline expired. And keep in mind

that where the "prison mailbox" rule applies, it may be difficult to figure out the relevant filing date. Under *Carey and Evans*, though, when the state courts have been willing to grant the extension of time at all, that should be enough, without having to determine exactly when the request was filed. Federal courts often grant retroactive extensions of time (except in those rare instances where they are prohibited). Once they are granted, no one looks back later to determine whether the motion was filed before or after the deadline expired. Yet the panel's approach here makes that date in state court decisive in the federal case.

As a sign of just how technical this can become, note that in Griffith's own case, the state did not even raise the timeliness issue until 22 months after he filed his federal petition. In an ordinary civil case, such a late assertion of a statute of limitations defense would likely be deemed a waiver. The district court can exercise its discretion to allow such a late assertion, of course, as happened here. Ironically, though, the federal court's belated extension of time had a fully retroactive effect, which allowed a new defense based on *not* giving retroactive effect to the state court's decision to grant an earlier retroactive extension of time.

The panel was concerned that a distinction between pre-and post-deadline extensions of time is necessary to prevent multi-year delays in the filing of appeals. 614 F.3d at 330, quoting *Fernandez v. Sternes*, 227 F.3d 977, 980 (7th Cir. 2000). This concern is exaggerated. Surely it would be extremely

rare for a state court to allow several years to appeal. Realistically, the state courts will allow extensions of time only after relatively short, justifiable delays such as the one at issue in this case. And in the rare case where a state court does allow a significant delay in bringing an appeal, a federal court should respect its reasons for doing so, in the interest of comity. See *Carey*, 536 U.S. at 223. (Recall that Illinois allows such extensions only "in the most extreme and compelling circumstances.") Otherwise, a federal court will find itself in the position of second-guessing the states' decisions about how to manage their own criminal justice systems.

3. *Giving the State More Protection Than It Sought*

By construing the tolling provision as it did, the panel disregarded the very interests that the provision was meant to protect. It is, after all, "the State's interests that the tolling provision seeks to protect." 536 U.S. at 223. The state courts concluded that the right and fair thing to do was to extend Griffith's time to seek review on the merits in this murder case with a life sentence. That decision deserves federal respect, particularly when the extension was needed not because of counsel's negligence but because of counsel's illness.

But under the panel's interpretation of the tolling provision, it does not matter what the state's interests might be. No matter the state court's reason for granting a retroactive extension of time to appeal, the federal clock continues to run. For example, if a prison riot or a natural disaster

prevented a prisoner from filing a petition for leave to appeal or a request for an extension of time to file within the time set by state rule, the federal clock apparently would run at least until the state prisoner was able to file a late petition for leave to appeal, if not longer. I recognize that there might be some room to argue for equitable tolling in such extreme cases. I also recognize that Griffith's lawyers took a chance by waiting until what they thought was the last day to file his federal petition. But federal law does not require the panel's result, and I believe the Supreme Court decisions discussed above point in the direction of honoring the state court's decision to allow a retroactive extension of time.

Finally, I note that Griffith has also sought rehearing en banc on the question whether a claim for actual innocence provides an exception to the statute of limitations in section 2244(d). Our circuit has said no, and there is already a circuit split on this issue. See *Araujo v. Chandler*, 435 F.3d 678, 681 (7th Cir. 2005) (reviewing split); see also *Lee v. Lampert*, 610 F.3d 1125, 1128 (9th Cir. 2010) (same). Regardless of the merits of that question, I agree with my colleagues that we should not rehear this case en banc to decide whether we should move from one side of the split to the other; that issue is now ripe for Supreme Court resolution.

Appendix B

In The United States Court Of Appeals For the Seventh Circuit

No. 09-2518

Evan Griffith,

v. *Petitioner-Appellant,*

Dave Rednour, Warden
Menard Correctional Center

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 06-1306–**Michael M. Mihm**, *Judge.*

ARGUED APRIL 5,2010–DECIDED
JULY 22, 2010

Before EASTERBROOK, *Chief Judge,* and BAUER and WOOD, *Circuit Judges.*

EASTERBROOK, *Chief Judge.* A state prisoner who wants collateral review in federal court must file a petition for a writ of habeas corpus within one year of "the date on which the judgment became final by the conclusion of direct review". 28 U.S.C.

§2244(d)(1)(A). (The statute restarts the clock under certain circumstances, such as the Supreme Court's recognition of a new constitutional right, but none of those possibilities matters here.) For Evan Griffith, who is serving a term of life imprisonment for murder, the end of direct review came in 1994. *People v. Griffith*, 158 Ill. 2d 476, 634 N.E.2d 1069 (1994), cert. denied, 513 U.S. 952 (Oct. 17, 1994). Post-conviction review in state court lasted until 2005. This entitles Griffith to the benefit of §2244(d)(2), which reads:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The principal dispute on this appeal concerns the meaning of the word "pending".

On July 13, 2005, the Illinois Appellate Court affirmed an order denying Griffith's petition for collateral review. He had 35 days to ask the Supreme Court of Illinois for leave to appeal. Ill. S. Ct. R. 315(b) (2005). (This rule has been renumbered as 315(b)(1); we refer to the version in force in 2005.) That time expired on August 17. Two weeks later, Griffith filed a petition for leave to appeal, together with a motion asking the court to accept his petition *instanter*. That motion was granted on September 13. On December 1, the Supreme Court of Illinois denied the petition for leave to appeal. And on

November 30, 2006. Griffith filed his petition for a writ of habeas corpus under 28 U.S.C. §2254. The federal petition is timely if and only if the state proceeding is treated as "pending" continuously through December 1, 2005. See *Wilson v. Battles*, 302 F.3d 745 (7th Cir. 2002) (review by the Supreme Court of Illinois ends on its decision date rather than the date of mandate). The district court concluded, however, that the proceeding stopped being "pending" on August 17, 2005, when Griffith's opportunity to file a (timely) petition for leave to appeal expired. That made the federal petition late, and the district court dismissed it. 2009 U.S. Dist. LEXIs 25794 (C.D. Ill. Mar. 30, 2009).

The district court relied on *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), which concluded that a state proceeding is no longer pending once the state court has made its decision and the time to seek further review has expired. Fernandez had contended that, if another state court accepts an untimely filing, the federal court should treat that decision as retroactively making the proceeding "pending" during the gap between the end of the authorized filing period and the acceptance of the document. We concluded that a state court's decision to accept an untimely paper makes it "properly filed" but held that this does not mean that the proceeding was "pending" during the gap between the end of the authorized filing period and the belated acceptance. We explained:

> It is sensible to say that a petition continues to be "pending" during the

> period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed), it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim. [If that were so], if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under §2244(d)(2) as long as the state court denied the belated request on the merits. That implausible understanding of §2244(d)(2) would sap the federal statute of limitations of much of its effect.

227 F.3d at 980. Griffith asks us to distinguish the grant of a motion for leave to file a petition *instanter* (his situation) from the grant of a motion for leave to file an untimely petition. According to Griffith, leave to file *instanter* means that the petition is timely as a matter of state law. That *is not* what the state court said, however. A decision to accept a document *instanter* (law Latin for "right now" or "immediately") does not make it timely; it just means that the document will be considered on the merits. That's exactly the effect of an order accepting an untimely document.

A court that decides to accept an untimely filing could say any of three things: (1) we accept this filing despite its belated submission; (2) we grant a retroactive extension of time; or (3) we accept this filing *instanter*. As far as we can see, these are identical for the purpose of Illinois law. See, e.g., *Wauconda Fire Protection District v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 424-29, 828 N.E.2d 216, 220-23 (2005). More importantly, they are identical for the purpose of federal law. (The meaning of "pending," a term in a federal statute, is a question of federal law.) The point of *Fernandez* is that state courts' decisions do not have retroactive effect. Once a petition has stopped being "pending," nothing a state court does will make it "pending" during the time after the federal clock began to run and before another paper is filed in state court. *Fernandez* holds that, if a state court accepts an untimely filing, a proceeding is "pending" from the paper's filing date; thus Griffith had a "pending" proceeding from September 1, 2005, when he tendered the motion for leave to file *instanter*, through December 1, 2005, when the state court denied the petition for leave to appeal. But nothing was pending from August 18 through 31. This meant that the year prescribed by §2244(d)(1) expired on November 17, 2006, and Griffith's federal petition was 13 days late.

Anticipating that we might agree with the district court on this subject, Griffith contends that *Fernandez* is inconsistent with post-2000 decisions of the Supreme Court, which say that a document is "properly filed" for the purpose of §2244(d)(2) if it

meets the procedures established by state law, and that if a state court accepts a paper and decides on the merits then it was "properly filed." See *Carey v. Saffold*, 536 U.S. 214 (2002). See also, e.g., *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009) (defining the term "final" in §2244(d)(1)(A)). In *de Jesus v. Acevedo*, 567 F.3d 941 (7th Cir. 2009), we reaffirmed *Fernandez*, which interprets the word "pending" rather than any of the other language in §2244(d). We do not doubt that Griffith's petition for leave to appeal was "properly filed" and that September 1 through December 1, 2005, is excluded for federal purposes. This does not imply that anything was "pending" from August 18 through August 31. Griffith does not make any argument that we overlooked in *de Jesus*. We shall leave *Fernandez* undisturbed.

Griffith contends that he did not commit the murder of which he stands convicted and maintains that the time limits in §2244(d) do not apply to a person who claims to be actually innocent. We held otherwise in *Escamilla v. Jungwirth*, 426 F.3d 868 (7th Cir. 2005), and are no more disposed to overrule that decision than we are to overrule *Fernandez*.

This leaves a request for tolling. *Holland v. Florida*, No. 09-5327 (U.S. June 14, 2010), holds that the deadline in §2244(d) is subject to equitable tolling, which is appropriate when an "extraordinary circumstance stood in [the] way" of a timely filing (slip op. 17, quoting from *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Holland added that a lawyer's "egregious behavior" (slip op. 18) satisfies that

standard, though neither "a garden variety claim of excusable neglect" nor a "miscalculation" about the time available for filing is an "extraordinary" circumstance (slip op. 19). Griffith blames the delay on his lawyer's illness, but the illness in question caused the delay in seeking leave to appeal in state court. This is why the state court accepted the untimely petition for leave to appeal Griffith does not contend that his lawyer's illness in August 2005 accounts for the decision to file the federal petition after the time to do so (mid-November 2006) had expired. An illness that justifies a belated state filing does not automatically justify an untimely federal filing more than a year later.

The most one could say is that his lawyer misunderstood how to determine when a state petition is "pending" for the purpose of §2244(d)(2). That sort of error is not "extraordinary"; it is all too common. Holland tells us that a simple legal mistake does not excuse an untimely filing. It may be negligent to wait until what is by a lawyer's own calculation the last possible day, because such a calculation could be wrong. But this kind of negligence is not "extraordinary" by any means. Such a blunder does not extend the time for filing a collateral attack. See *Lawrence v. Florida*, 549 U S. 327, 336 (2007).

AFFIRMED

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

EVAN GRIFFITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 06-1306
	)	
DONALD GAETZ, Warden,	)	
	)	
Respondent.	)	

ORDER

Now before the Court is Petitioner, Evan Griffith's ("Griffith"), Motion to Reconsider from the dismissal of his Petition for Writ of Habeas Corpus Pursuant to 28 U S C. § 2254. For the reasons set forth below, the Motion to Reconsider [#50] is DENIED.

BACKGROUND

Following a jury trial in the Circuit Court of Livingston County, Illinois, Griffith was found guilty of first degree murder and unlawful possession of a weapon by a person in the custody of the Illinois Department of Corrections ("IDOC"). He was sentenced to death on the murder conviction and a consecutive term of 30 years' imprisonment on the

weapons conviction. His death sentence was subsequently commuted to life in prison without parole by former Governor George Ryan.

As Griffith was sentenced to death, his appeal went directly to the Illinois Supreme Court, raising 12 claims of error. The Illinois Supreme Court affirmed Griffith's convictions and sentences on April 21, 1994 On October 17, 1994, Griffith's Petition for Writ of Certiorari to the United States Supreme Court was denied.

On March 31, 1995, Griffith filed a post-conviction petition in the Livingston County Circuit Court His petition was amended on January 6, 2000, and again on May 21, 2001. Following an evidentiary hearing, his petition was denied On appeal to the Illinois Appellate Court, Fourth District, the denial of post-conviction relief was affirmed on July 13, 2005. On September 1, 2005, Griffith filed a petition for leave to file a PLA to the Illinois Supreme Court instanter, which was granted on September 13, 2005. The Illinois Supreme Court then denied Griffith's PLA.

Griffith then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court. The Court subsequently granted his request for new counsel to appear and file an amended petition. The State moved to dismiss the petition as untimely, and that motion was ultimately granted.

In denying Griffith's petition, the Court noted that his direct appeal became final on October 17,

1994, when the United States Supreme Court denied his petition for a writ of certiorari. As his direct appeal concluded prior to the enactment of the AEDPA, the Seventh Circuit has held that his one-year clock began to run on April 24, 1996. *See Newell v. Hanks*, 283 F.3d 827, 832-33 (7th Cir. 2002). Griffith already had a post conviction petition pending in the circuit court at that time, which tolled the limitations period until July 13, 2005, when the denial of the petition was affirmed by the Illinois Appellate Court. Because he had filed an affidavit of intent to file a PLA with the Illinois Supreme Court, Griffith then had 35 days, or until August 17, 2005, in which to file his PLA. On September 1, 2005, Griffith filed a motion for leave to file a PLA instanter, which was granted on September 13, 2005. The PLA was then denied on December 1, 2005, and his first filing with this Court did not occur until November 30, 2006.

DISCUSSION

"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale de Credit v. CBI Industries*, 90 F.3d 1264, 1269 (7th Cir. 1996). Furthermore, it is not appropriate to argue matters that could have been raised in prior motions or rehash previously rejected arguments in a motion to reconsider. *Id.* at 1270.

In finding the Petition untimely, the Court held that beginning on August 18, 2005 (the day after his PLA was due), Griffith's period of

limitations began to run and continued to run until September 1, 2005, when his motion for leave to file his PLA instanter was filed, because he had no pending pleading to toll it. These 14 days, coupled with the 365 days that passed before the filing in this Court exceeded the one-year period of limitations. Perhaps the Court contributed to Griffith's confusion by not carefully drawing the distinction between the term "properly filed" and "pending." This distinction is an important one, as Griffith's PLA was likely properly filed as a result of the permission for leave to file instanter by the state court. That being said, however, does not mean that it was "pending" for purposes of § 2244(d)(2).

The Seventh Circuit has clearly recognized the difference between "properly filed" and "pending", as demonstrated in *Fernandez v. Sternes*, 227 F.3d 977, 979-981 (7th Cir. 2000):

> [N]o one would suppose, if a state allows a second collateral attack, that this excludes all time since the prisoner began his first collateral attack, even though nothing at all was 'pending' during the intervening months. Just so, again, with motions to file untimely appeals and applications for discretionary review. . . . It is sensible to say that a petition continues to be 'pending' during the period between one court's decision and a timely request for further review by a higher court (provided

> that such a request is filed); it is not sensible to say that the petition continues to be 'pending' after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was 'pending' in the interim.

Similarly, in *Johnson v. Chandler*, 224 Fed.Appx. 515, 517-18 (7th Cir. 2007), the Court of Appeals relied on *Fernandez* in finding that the one-year period of limitations was not tolled during the time between the decision by the appellate court and the time that an untimely PLA was filed. The Seventh Circuit noted:

> The only period that can be excluded from the year under § 2244(d)(2) is the period that the petition is "pending" under § 2244(d)(2), beginning from the time the prisoner asks the state court to excuse his default to the time the court issues its decision on the merits. Johnson did not file his petition with the Illinois Supreme Court until more than a month after the 21-day deadline under Illinois Supreme Court Rule 315(b) had passed, so it was not "pending" before the court until he filed the late petition.

Id., at 517 (internal citations omitted). *See also, Streu v. Dormire*, ___ F.3d ___, 2009 WL 465963 (8th

Cir. Feb. 26, 2009) (joining other courts of appeal in concluding that "an application is not 'pending' between the expiration of the time for appeal and the filing of a petition for belated appeal), citing *McMillan v. Secretary for Department of Corrections*, 257 Fed.Appx. 249, 252 (11th Cir. 2007); *Allen v. Mitchell*, 276 F.3d 183, 186 (4th Cir. 2001); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001); *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Fernandez*, 227 F.3d at 979.

In order to qualify for tolling under § 2244(d)(2), a petition must not only be "properly filed" but must also be "pending" in state court. The fact that the Illinois Supreme Court allowed his Motion for Leave to File PLA Instanter rendered his PLA properly filed under state law. However, federal courts addressing this issue have consistently held that state law does not determine whether a petition is "pending" for purposes of § 2244(d)(2); rather, the definition of "pending" is a matter of federal law. *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999). In rejecting the petitioner's argument that the allowance of an out of time appeal magically transforms all of his post-conviction filings into one properly filed proceeding, the Tenth Circuit succinctly stated, "The state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state court." *Gibson*, 232 F.3d at 804.

Accordingly, the Court respectfully rejects Griffith's argument that the fact that his PLA may have been properly filed under state law requires the tolling of the 14-day period between the expiration of his time to file the PLA and the filing of his Motion for Leave to File PLA Instanter. Although the Seventh Circuit has not addressed the exact issue presented here, the Court finds that closely analogous holdings in *Fernandez* and *Johnson* suggest that it would join the Tenth and Eighth Circuits in holding that whether a petition is pending is a matter of federal law and that a petition cannot be "pending" during a time when the time for filing has expired yet nothing has in fact been filed, even if a state court subsequently grants leave to file the petition. Thus, Griffith is not entitled to tolling for the 14-day period that elapsed after his time to file his PLA expired with no filing, and his Petition was properly dismissed as untimely.

CONCLUSION

For the reasons set forth herein, Griffith's Motion to Reconsider from the Dismissal of his Petition for Writ of Habeas Corpus [#50] is DENIED.

ENTERED this 4th day of June, 2009.

s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

Appendix D

Monday, 30 March, 2009 12:08:22 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

EVAN GRIFFITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 06-1306
	)	
DONALD GAETZ, Warden,	)	
	)	
Respondent.	)	

ORDER

Now before the Court is Petitioner, Evan Griffith's ("Griffith"), Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the Petition [#29] is DISMISSED as untimely.

FACTUAL BACKGROUND

Following a jury trial in the Circuit Court of Livingston County, Illinois, Griffith was found guilty of first degree murder and unlawful possession of a weapon by a person in the custody of the Illinois Department of Corrections ("IDOC"). He was sentenced to death on the murder conviction and a

consecutive term of 30 years' imprisonment on the weapons conviction. His death sentence was subsequently commuted to life in prison without parole by former Governor George Ryan.

As Griffith was sentenced to death, his appeal went directly to the Illinois Supreme Court. On appeal, he raised 12 claims of error: (1) the trial court violated his Sixth Amendment right to counsel by forcing him to proceed pro se in deciding whether to give a second-degree murder instruction to the jury; (2) he did not knowingly waive his right to have a second-degree murder instruction presented to the jury; (3) trial counsel was ineffective in connection with the jury instruction issue; (4) he was denied a fair trial when the prosecution insinuated that he had a gang-related motive for the murder; (5) he was denied a fair trial when the prosecution suggested that he had threatened two prosecution witnesses; (6) he was denied a fair trial when the prosecution elicited testimony from witnesses that they had been intimidated but the record did not indicate that it was Griffith that had threatened them; (7) he was denied a fair trial when the prosecution elicited victim impact testimony during the guilt phase and then referred to that testimony in its closing argument; (8) he was denied his right to individualized consideration in sentencing when the trial judge refused to consider evidence of his good character; (9) his death sentence violated the Eighth Amendment because of the trial judge's beliefs; (10) his death sentence violated the Eighth Amendment because the trial court relied on information outside

the record that he was not allowed to explain or rebut; (11) Illinois' death penalty statute violates the Eighth Amendment because it does not allow for meaningful consideration of mitigation evidence; and (12) Illinois' death penalty statute violates the Eighth Amendment because it does not sufficiently minimize the risk of arbitrary or capricious death sentences. The Illinois Supreme Court affirmed Griffith's convictions and sentences on April 21, 1994. On October 17, 1994, Griffith's Petition for Writ of Certiorari to the United States Supreme Court was denied.

On March 31, 1995, Griffith filed a post-conviction petition in the Livingston County Circuit Court in which he raised essentially five claims of error: (1) trial counsel was ineffective for failing to file a motion to preclude the use of his prior murder conviction to impeach his trial testimony; (2) trial counsel was ineffective for failing to introduce evidence that the victim had ordered acts of violence to be committed against other inmates; (3) he was denied his right to a fair trial because his trial testimony was impeached by the use of a prior murder conviction that had been obtained in violation of his right to effective assistance of counsel; (4) his death sentence was invalid because it relied on his prior murder conviction; and (5) his trial counsel was ineffective for failing to investigate and present relevant mitigation evidence. His petition was amended on January 6, 2000, to add the following claims: (6) he is actually innocent of first-degree murder because three prosecution witnesses

had since recanted their testimony; (7) he was denied his right to a fair trial because the State coerced the three inmate witnesses to testify falsely at trial; and (8) trial counsel was ineffective for failing to interview one of the state's inmate witnesses and a correctional officer. The petition was amended for the second time on May 21, 2001, and three additional claims were added: (9) trial counsel was ineffective for failing to introduce evidence that the victim was in prison for murder; (10) the State failed to disclose the victim's rap sheet showing his history of violence; and (11) trial counsel was ineffective for failing to object to the form of the not-guilty verdict forms, and appellate counsel was ineffective for failing to raise the issue on appeal. Griffith's claims regarding the witness recantations were denied after an evidentiary hearing, and the remainder of his claims were also denied.

On appeal to the Illinois Appellate Court, Fourth District, Griffith presented 11 arguments: (1) the witness recantations left no evidence of his guilt; (2) the witness recantations revealed that their false testimony was procured by coercion and undisclosed promises; (3) the evidence produced in the post-conviction proceedings demonstrated that he was actually innocent; (4) the circuit court applied an improper presumption that discounted the recantation testimony and abused its discretion; (5) his due process rights were violated when the state failed to disclose the criminal histories of the victim and the inmate eyewitnesses; (6) the circuit court erred in dismissing his claim that trial counsel was

ineffective for failing to fully investigate and present his self-defense claim; (7) the circuit court erred in dismissing his claim that trial counsel was ineffective for failing to interview a correctional officer; (8) the circuit court erred in denying his request to examine the victim's IDOC master file; (9) his convictions are void because they were obtained through the efforts of an attorney who was neither an assistant state's attorney nor an assistant attorney general; (10) the circuit court erred in dismissing his claim that counsel was ineffective for failing to object to the form of the not-guilty verdict forms; and (11) the cumulative violations of his constitutional rights require a new trial. The denial of post-conviction relief was affirmed by the Illinois Appellate Court on July 13, 2005.

On September 1, 2005, Griffith filed a petition for leave to file a PLA to the Illinois Supreme Court instanter, which was granted on September 13, 2005. In his PLA, Griffith made three arguments: (1) he was denied his due process right to a full and fair evidentiary hearing where the circuit court exceeded the presumption of unreliability applicable to recantation testimony and denied him the ability to present testimony or obtain records to corroborate the recantation testimony; (2) the appellate court misapplied *Brady v. Maryland*, in concluding that the inmate files and criminal histories of the victim and inmate witnesses were not exculpatory evidence; and (3) trial counsel was ineffective for failing to investigate and present evidence in support of his claim of self-defense and failing to object to the

improper not-guilty forms, and appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness regarding the verdict forms. The Illinois Supreme Court denied Griffith's PLA.

Griffith initially filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising 11 claims of error. The Court subsequently granted his request for new counsel to appear and file an amended petition. The Amended Petition presents eight claims of error: (1) he was denied his right to due process in connection with the jury instructions for second-degree murder; (2) the Illinois Supreme Court's decision that his waiver of his right to the second-degree murder instruction was knowing and intelligent was based on an unreasonable determination of the facts; (3) the Illinois Supreme Court unreasonably applied clearly established precedent in determining that the circuit court did not deprive him of the effective assistance of counsel when he was forced to proceed pro se regarding the consideration of a second-degree murder instruction; (4) the Illinois Supreme Court's rejection of his claim that counsel was ineffective at the jury instruction conference was contrary to, and an unreasonable application of, clearly established precedent; (5) his due process rights were denied by the State's knowing use of false testimony; (6) the suppression of material, non-cumulative impeachment and exculpatory evidence deprived him of a fair trial; (7) his trial counsel was ineffective for failing to fully investigate the victim's background and provide evidence of his violent character, investigate the

criminal histories of the State's inmate witnesses, interview the State's motive witness, and object to the not-guilty verdict forms, and his appellate counsel was ineffective for failing to raise the verdict form issue on appeal; and (8) the Illinois Appellate Court's rejection of his cumulative error claim was contrary to, and an unreasonable application of, clearly established federal law. The matter is now fully briefed, and the State has moved to dismiss the Petition as untimely. This Order follows.

LEGAL STANDARD

I. Timeliness of Petition

There are statutory time limits which govern whether a district court can entertain a petition for writ of habeas corpus. The present case is covered by 28 U.S.C. § 2244, which states in relevant part:

> A 1 year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State

> action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; and
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The time during which a properly filed application for post-conviction or other collateral review is pending in the state courts is not counted toward any period of limitation. 28 U.S.C. § 2244(d)(2).

In the present case, Austin alleges that he is entitled to relief because of errors purportedly made by his attorneys, the prosecutor, and the trial court. He makes no assertion that there is any newly recognized constitutional right, that he was prevented from filing, or that he was unable to discover the factual predicate for his claims through the exercise of due diligence. Thus, this case does not involve the application of sub-sections (B), (C), or (D) above.

Here, Griffith's direct appeal became final on October 17, 1994, when the United States Supreme Court denied his petition for a writ of certiorari. As his direct appeal concluded prior to the enactment of the AEDPA, the Seventh Circuit has held that his one-year clock began to run on April 24, 1996. *See Newell v. Hanks*, 283 F.3d 827, 832-33 (7th Cir. 2002) Griffith already had a post-conviction petition pending in the circuit court at this time, which tolled the limitations period until July 13, 2005, when the denial of the petition was affirmed by the Illinois Appellate Court.

Because he had filed an affidavit of intent to file a PLA with the Illinois Supreme Court, Griffith then had 35 days, or until August 17, 2005, in which to file his PLA. On September 1, 2005, Griffith filed a motion for leave to file a PLA instanter, which was granted on September 13, 2005. The PLA was then denied on December 1, 2005, and his first filing with this Court did not occur until November 30, 2006.

The State argues that beginning on August 18, 2005 (the day after his PLA was due), Griffith's period of limitations began to run and continued to run until September 1, 2005, when his motion for leave to file his PLA instanter was filed, because he had no properly filed pleading to toll it. In support of this argument, the State cites *Fernandez v. Sternes*, 227 F.3d 977, 979-981 (7th Cir. 2000):

> [N]o one would suppose, if a state allows a second collateral attack, that this excludes all time since the prisoner

> began his first collateral attack, even though nothing at all was 'pending' during the intervening months. Just so, again, with motions to file untimely appeals and applications for discretionary review. . . It is sensible to say that a petition continues to be 'pending' during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be 'pending' after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was 'pending' in the interim.

The State contends that the period began to run again after the Illinois Supreme Court denied his PLA on December 1, 2005. Accordingly, Griffith's federal habeas corpus petition should have been filed on or before November 17, 2006.

Griffith responds that under *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002), his application for post-conviction relief remains pending until it has achieved final resolution through the State's post-conviction procedures. He further cites *Evans v. Chavis*, 546 U.S. 189, 219-20 (2006), for the proposition that the normal definition of "pending" is "in continuance" or "not yet decided" and that "means that an application is pending as long as the

ordinary state collateral review process is 'in continuance' – i.e., 'until the completion of that process." In other words, Griffith argues that under *Evans*, courts are prohibited from excluding time between levels of state appellate review, suggesting that *Saffold* and Evans have effectively overruled *Fernandez*.

In *Saffold*, the Supreme Court held that a petition for collateral review in the state courts remains "pending" during the time between a lower state court's decision and the filing of a notice of appeal to a higher state court. 536 U.S. at 220-21. However, the holding in *Saffold* presumes that the filing of the notice of appeal was timely under state law; the Supreme Court declined to address the question of whether this rule applied when the notice of appeal to the higher state court was untimely. *Chavis*, 546 U.S. at 191-92. In *Chavis*, the Supreme Court revisited its holding in *Saffold*, emphasizing the need to determine the timeliness of the filing of the attempt to appeal the lower court's ruling and went on to discuss how the State of California, which does not set a definitive time limit for appealing to a higher court, should ascertain whether an appeal was timely filed., *Id.*, at 197-201. Thus, contrary to Griffith's assertions, neither case expressly or implicitly overrules the Seventh Circuit's holding in *Fernandez*.

It is also apparent that the Seventh Circuit has not interpreted either *Saffold* or *Chavis* as overruling its holding in *Fernandez*. In *Johnson v. Chandler*, 224 Fed. Appx. 515, 517-18 (7th Cir.

2007), the Court of Appeals relied on *Fernandez* in finding that the one-year period of limitations was not tolled during the time between the ruling of the appellate court and the time that an untimely PLA was filed. The Seventh Circuit noted:

> The only period that can be excluded from the year under § 2244(d)(2) is the period that the petition is "pending" under § 2244(d)(2), beginning from the time the prisoner asks the state court to excuse his default to the time the court issues its decision on the merits. Johnson did not file his petition with the Illinois Supreme Court until more than a month after the 21-day deadline under Illinois Supreme Court Rule 315(b) had passes, so it was not "pending" before the court until he filed the late petition.

Id., at 517 (internal citations omitted). *See also, Streu v. Dormire*, ____ F.3d___, 2009 WL 465963 (8th Cir. Feb. 26, 2009) (joining other courts of appeal in concluding that "an application is not 'pending' between the expiration of the time for appeal and the filing of a petition for belated appeal), *citing McMillan v. Secretary for Department of Corrections*, 257 Fed. Appx. 249, 252 (11th Cir. 2007); *Allen v. Mitchell*, 276 F.3d 183, 186 (4th Cir. 2001); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th

Cir. 2001); *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Fernandez*, 227 F.3d at 979 [1]

Griffith also cites *Kliner v. McCann*, 2008 WL 4922590, at *3-5 (N.D.Ill. Nov. 13, 2008), for the proposition that the granting of a petition for leave to file instanter is essentially an extension of the time period for filing a PLA. However, his reliance on this case is again misplaced, as Judge Darrah expressly

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[1] The Supreme Court's recent opinion in *Jimenez v. Quarterman*, ___U.S. ___, 129 S.Ct. 681 (2009), may also be instructive. Although discussed in the context of a request to reopen direct review in a state court criminal proceeding and when the conclusion of direct review becomes "final", the Supreme Court noted that an order granting leave to file an untimely appeal "restore[d] the pendency of the direct appeal." *Id.*, at 686. Griffith argues that in holding that the granting of a motion to reopen the direct appeal postpones the date upon which the judgment becomes final, the Supreme Court effectively held that the granting of a motion to make an untimely filing effectively tolled the statute of limitations in every circumstance. However, in making this argument, Griffith uses "finality" and "pendency" interchangeably and ignores the difference in the role played by the conclusion of direct review and post-conviction proceedings in a habeas corpus case. The Court finds that a better reading of *Jimenez* is that while the granting of leave to pursue a late appeal on direct review postpones the finality or conclusion of direct review for purposes of the limitations period, that is not synonymous with a finding that the direct appeal was pending for that entire time. In fact, the portion of the opinion referenced previously in this paragraph could be read to recognize that the appeal was not "pending" during the time that elapsed from the expiration of the time for filing the notice of appeal until the motion for leave to file was granted.

distinguished the situation in *Fernandez*, where a petitioner missed a deadline completely and sought permission to file an untimely petition, from the situation in Kliner, where the petitioner had filed a timely PLA but was subsequently granted leave to correct minor formatting errors in the petition. *Id.*, at *3. Griffith's situation is much more closely analogous to the situation in *Fernandez*. He did not file anything prior to the expiration of the time for filing a PLA, and in his Motion for Leave to File Petition for Leave to Appeal Instanter, he expressly acknowledged that his filing was untimely. Thus, his request for leave to file was because he completely missed the filing deadline: it was not merely a request to correct formatting or other ministerial errors. Accordingly, his argument based on *Kliner*, which in any event is not binding on this Court, must be rejected.

Griffith next urges the Court to apply equitable tolling to allow his petition to be considered on the merits. The Court first notes that the Seventh Circuit has not held that equitable tolling is available in the context of a § 2254 petition, referring to its availability as "dubious." *Williams v. Buss*, 538 F.3d 683, 685 (7th Cir. 2008), *citing Johnson v. Chandler*, 224 Fed. Appx. 515, 519 (7th Cir. 2007); *Williams v. Sims*, 390 F.3d 958, 963-64 (7th Cir. 2004); *Modrowski v. Mote*, 322 F.3d 965, 967 n 12 (7th Cir. 2003). Even if equitable tolling is available, it requires "extraordinary circumstances far beyond the litigant's control. . ." *Id.*, *citing United States v Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2010).

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.*, *citing Pace v. DiGuglielmo*, 554 U.S. 408, 418 (2005).

Here, Griffith's filing was late because during the week that the filing was due, counsel was incapacitated by a fever, chills, congestion, and severe sinus headaches. (Motion for Leave to File PLA Instanter at ¶ 6) In *Marcello*, the Seventh Circuit declined to apply equitable tolling in a situation where a habeas petition was filed one day late as a result of the death of counsel's father, noting:

> Foreclosing litigants from bringing their claim because they missed the filing deadline by one day may seem harsh, but courts have to draw lines somewhere, statutes of limitation protect important social interests. . . . Though we sympathize with the attorney who suffered the loss of her father several weeks before the deadline, the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule. . . . The deadline simply was missed. That is not grounds for equitable tolling.

212 F.3d at 1010.

Similarly, in *Modrowski*, the filing was untimely as a result of attorney incapacitation. 322 F.3d at 967. The Court of Appeals rejected the request for equitable tolling, equating attorney incapacitation with attorney negligence. *Id.*, at 967-68. The petitioner argued that incapacity was distinguishable from negligence, as "there is no way for a client to anticipate or protect against an attorney's sudden onset of illness, whereas a client can check the attorney's references and disciplinary records for signs of negligence" *Id.*, at 968. The Seventh Circuit found "no principled distinction" between the two, concluding that:

> [A]ttorney incapacity is equivalent to attorney negligence for equitable tolling purposes. We will not revisit out long-standing determination that petitioners bear ultimate responsibility for their filings, even if that means preparing duplicative petitions: petitioners, "whether in prison or not, must vigilantly oversee the actions of their attorneys and, if necessary, take matters into their own hands."

Id., *citing Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001). In fact, the Seventh Circuit has "yet to identify a factual circumstance so extraordinary that it warrants equitable tolling." *Chandler*, 224 Fed. Appx. at 519.

Given this precedent, the Court must conclude that the temporary incapacity of Griffith's counsel

due to illness does not qualify as a basis for equitable tolling in this case. The Court would also note that the initial delay due to illness in filing the PLA in the Illinois Supreme Court would not have been dispositive had counsel not then waited until what he had calculated to be the last day of the one-year limitations period to file his § 2254 petition.

The Court therefore concludes that the one-year limitations period was not tolled during the 14 days which elapsed between the expiration of the time to file a PLA and the filing of Griffith's Motion for Leave to File. When added to the 364 days that elapsed between the denial of his post-conviction PLA and the filing of his § 2254 petition, the time period exceeds the statutorily prescribed 1-year period of limitations after which a federal court cannot entertain a petition brought pursuant to § 2254 by a prisoner in state custody, and that equitable tolling, even if available, would not be appropriate. Therefore, the petition must be dismissed as untimely.

CONCLUSION

For the reasons set forth herein, Respondent's Motion to Dismiss [#39] is GRANTED, and Griffith's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [#29] is DISMISSED as untimely. This matter is now terminated.

ENTERED this 30th day of March, 2009.

s/ Michael M. Mihm
Michael M. Mihm
United States District
Judge

Appendix E

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT

SUPREME COURT BUILDING
SPRINGFIELD 62701

December 1, 2005

State's Attorneys App. Pros. Springfield
Fourth Judicial District
725 South Second Street
Springfield, IL 62704

No. 101228 - People State of Illinois, respondent, v. Evan Griffith, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Order entered by Justice Garman.

Appendix F

No. 4-03-0731
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

July 13, 2005

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
EVAN GRIFFITH,
Defendant-Appellant.

Appeal from Circuit Court of Livingston County
No. 91CF15
Honorable Harold J. Frobish, Judge Presiding.

ORDER

In 1992, a jury convicted defendant, Evan Griffith, a prison inmate, of first degree murder and unlawful possession of a weapon by a person in the custody of the Illinois Department of Corrections (DOC). (Ill. Rev. Stat. 1989, ch. 38, pars. 9-1(a)(1),(a)(2), 24-1.1(b)). The trial court sentenced defendant to death on the murder conviction and to a concurrent 30-year prison term on the weapon conviction. In 1994, the Supreme Court of Illinois affirmed defendant's conviction and death sentence in a 4-3 decision. *People v. Griffith*, 158 Ill. 2d 476, 634 N.E.2d 1069 (1994). In 1995, defendant filed a

petition seeking postconviction relief. In January 2003, while defendant's petition was pending in the trial court, the Governor of Illinois commuted defendant's death sentence to a sentence of life without parole. In August 2003, after an evidentiary hearing, the court denied defendant's petition for postconviction petition.

Defendant appeals, arguing the trial court erred in denying his postconviction relief. We affirm

I. BACKGROUND

On January 22, 1991, the State indicted defendant and defendant's fellow inmate, Wilford Mackey, on five counts of first degree murder for the stabbing death of another inmate, Joseph Moore (also known as James Jones). The State also charged defendant with unlawful possession of a weapon by a person in the custody of DOC. On July 3, 1991, the trial court ordered defendant and Mackey's trials be severed.

During trial, Ed Kallal, a DOC investigator and crime-scene technician, testified that he had investigated the stabbing death of Moore on the south yard at the Pontiac Correctional Center (Pontiac). According to Kallal, the south yard is a fenced-in area that measures approximately 279 feet by 319 feet. The yard includes a baseball field in one corner, an asphalt running track around its circumference, an outside bathroom, and eight telephones in partial booths laid out east to west along its south wall. The bathroom has walls

approximately 40 inches high around it, with openings for two separate toilet stalls.

When Kallal first arrived at the crime scene, he noticed a pool of blood near the first base line of the baseball field and a round metal rod near the blood. Kallal then found some blood below the northeastern phone booth and a trail of blood that "went kind of [in] a northwesternly [*sic*] direction at first and then headed by the bathrooms and went out into the grass for about 40 feet." Kallal found a round, homemade, ice-pick-type shank inside the phone booth and a pair of broken eyeglasses that belonged to Moore on the nearby ground. Kallal followed the blood trail and discovered a flat-bladed shank between the phone booth and the bathroom. The police later found defendant's palm print on the handle of the flat metal shank, but no identifiable fingerprints were on the other shank.

Kallal found blood droplets on the outside of the bathroom wall. He also found droplets on the inside surfaces of the wall. In Kallal's opinion, the blood may have been left on the wall by someone running past the wall with a bleeding head wound. Kallal also stated that Moore had suffered a wound to his forehead that was approximately 3/4 inches wide and 1-3/4 inches long.

Superintendent William Boyd testified that he was on duty the day of the incident. Boyd stated that shortly after 11 a.m., he received a radio call telling him that an individual was down on the south yard. Boyd then went to the yard and found an inmate

lying facedown with a puddle of blood near his mouth. Boyd testified that initially he could not identify the inmate because his face was badly bruised In addition, Boyd did not see a metal rod or pipe near Moore.

After the incident, correctional officers Kevin Smith and Terry Mulligan searched the south yard and "shook down" the inmates who were in the yard. Smith and Mulligan did not discover any weapons on the inmates that were there, but Smith and Mulligan saw the two shanks to which Kallal had testified.

During the search, Smith also found a trash bag that was tied to a fence. Smith emptied the bag and found a metal bar in that bag. Smith picked the bar up by the handle end and laid it down next to Moore's body. The police, however, were not able to find any blood or identifiable fingerprints on the metal bar.

Correctional officer Eddie Grant also testified to the incident. According to Grant, on the day of the incident, he went to the south yard at around 10:45 a.m. to inform the inmates that it was time for them to form the lines for lunch. Grant saw defendant, Mackey, Moore, and another inmate, Simmons, sitting on a table in the yard. As Grant came onto the yard, Moore walked away from the table to the telephone area. Grant walked toward the table, and Mackey told Grant that the group would eat later, "maybe get a pizza or something." Grant turned back, locked the gate behind him and returned to the cellhouse Grant testified that he was aware that

defendant, Mackey, and Moore were all members of the Black Gangster Disciples.

Shortly after 11 a.m., Grant learned that an inmate was down at the south yard and he returned to the yard. Grant then saw Moore lying on the ground facedown, but he could not recall whether he saw a metal rod nearby.

Roberta Jones, the mother of Moore, testified that she had talked with Moore on the phone between 10:45 a.m. and 10:50 a.m. on October 2, 1990. Innie Jones, Moore's wife, testified that on October 2, 1990, Moore called her at approximately 11 a.m. They talked for about five minutes, and Moore "was in [a] fairly good mood." Innie then had a telephone call at the office and placed Moore on hold. When she returned to the call, Innie heard the phone "banging against something" four to five times, and then somebody hung up the phone.

Dr. Hans Stroink, the pathologist who performed the autopsy on Moore, stated that he found a blunt trauma on Moore's head. In Dr. Stroink's opinion, the injury was caused by considerable force and consistent with a blow from the metal rod that Officer Smith had found in the trash bag. Dr. Stroink noted that there was also a nick at the bridge of Moore's nose, which may have been caused by Moore's broken eyeglasses. Dr. Stroink concluded that Moore's facial injuries were unlikely to have been caused by falling into the outside bathroom wall. However, he admitted that he

could not exclude the wall as a possible cause of Moore's facial injuries.

Dr. Stroink further testified that Moore suffered an incisional wound to his upper chest that was consistent with a stab from the flat shank that the police had discovered. According to Dr. Stroink, the wound and the resulting hemorrhage was the cause of Moore's death.

DOC investigator Russell Nelson then testified for the State. Russell stated that he organized the investigation of Moore's death. Investigator Nelson conducted an initial round of interviews of more than 60 inmates and a second round of interviews of more than 10 inmates. According to Investigator Nelson, three inmates, Michael Marzette, Bernie Cleveland, and Larry Nelson, had given statements to him indicating that they had seen the incident. Investigator Nelson acknowledged that, for the safety of the inmates, he transferred the three inmates to medium-security prisons. Investigator Nelson stated that the inmates would be less safe in a maximum-security prison such as Pontiac, and there is less gang influence in medium-security prisons. Investigator Nelson stated that Inmate Nelson was released from prison not too long after the investigation and it was possible that Larry got out "earlier than he would have if he would not have testified." Investigator Nelson also acknowledged that he may have told his superiors to restore good time for the inmate witnesses. Investigator Nelson, however, stated that he did not know if any of the inmates had their previously lost good-time credits

restored and that he himself had "nothing to do with restoring any grade or lost good time or anything like that for these three inmates."

Marzette, Cleveland, and Inmate Nelson testified as eyewitnesses to the incident, and each one indicated that they saw defendant stab Moore. On the stand, both Marzette and Cleveland acknowledged that they had initially told the DOC investigators that they did not see anything. Both of them stated that a majority of the south cellhouse inmates at Pontiac belonged to gangs, and they belonged to the Vice Lords.

Marzette testified that he was speaking to his fiancée on a phone when he saw a black man strike Moore on the side of the head. Marzette indicated that at the time of the attack, Moore was using a phone at the end, which was four or five booths away from the phone he was using. According to Marzette, Moore dropped his phone and began to defend himself, and at that time, defendant stabbed Moore, who did not have a weapon in his hands.

At the time of the incident, Cleveland was also using a telephone. As he was talking on the phone, Cleveland saw a black man strike Moore on the head with a metal pipe while Moore was using the phone at the opposite end. Cleveland then saw defendant stabbing Moore in the chest. Cleveland indicated that after the stabbing, Moore ran toward the outdoor toilets. Moore was bleeding and eventually fell onto the ball field. Cleveland indicated Moore did not fall before reaching the ball field and that Moore

had nothing in his hand. Cleveland estimated that the entire incident took three to five seconds. Russell Nelson, the DOC investigator, later stated that Cleveland had told him that the black guy only served as a "lookout" for defendant and did not attack Moore. Cleveland acknowledged that he was later transferred to a lower security prison. Cleveland, however, denied having any previously lost good-time credits restored or receiving any other benefits for his cooperation.

Inmate Nelson identified himself as a member of the Black Gangster Disciples. According to inmate Nelson, he was using the telephone next to Moore when the incident occurred. Specifically, he heard a "popping noise," turned around, and saw Mackey try to hit Moore with a pipe. Inmate Nelson then saw defendant stab Moore in the chest. After the stabbing, Moore ran past the outdoor toilets and fell on the ball field. Inmate Nelson stated that Moore did not have any weapon in his hand.

After the above testimony, defendant and two other inmates testified on defendant's behalf. Defendant admitted that he had stabbed Moore but insisted that his actions were in self-defense.

According to defendant, Moore, Mackey, and himself were all members of the Black Gangster Disciples. Moore was the leader of the gang in Pontiac. Defendant served as Moore's "personal secretary" and "bodyguard." Due to his position within the gang, defendant was required by the gang to carry a weapon. Defendant testified that Moore

and he occasionally did not see "eye to eye" because Moore often assigned him menial tasks to test his loyalty and Moore was violent toward other inmates.

On the night before the incident, at around 9 p.m., defendant received a message that Moore wanted to see him. Since defendant was in another part of the prison cleaning, he could not go to see Moore and return to his own cell in time for the 9 p.m. lockup. Defendant, therefore, sent word to Moore that he could not meet with Moore that night but would see him the next morning.

Defendant met with Moore the next morning while they both waited to go into the south yard. Moore was upset that defendant did not see him the night before and became verbally abusive toward defendant. According to defendant, Moore did not want to hear his explanation and was very angry with him. When they entered the south yard, Moore told defendant to leave him alone, and they went in different directions.

After watching a basketball game for a while, defendant went to the telephone area and sat on a table next to another inmate, John Gibson. At that time, Moore was speaking on a telephone. Defendant told Gibson about his problem with Moore, and Gibson suggested that defendant should try to clear things up with Moore.

Defendant approached Moore and tapped him on the shoulder while Moore was talking on the telephone. Moore told defendant to "get the fuck

away" and pulled out a shank. Afraid that Moore might kill him, defendant pulled out his own shank, which Moore had required him to carry, and motioned for Moore to back away. However, instead of backing away, Moore stepped toward defendant, bobbing and weaving with the shank, doing "a little dance." Defendant jabbed his shank toward Moore to repel him. Moore quickly ducked down, and when he came up, defendant stabbed him in the chest. After that, both men dropped their shank. Moore ran toward the ball field, lost his footing, and fell against the concrete wall around the outdoor toilets. Defendant hid his shank underneath some gravel, walked toward the gate, and told an officer that he had a visit so that the guard would open the gate and let him leave the south yard.

Defendant testified that, even though he stabbed Moore, he only wanted to scare Moore away and did not intend either to stab or to kill Moore. Defendant admitted that he had not told the truth about the incident when he was first interviewed by DOC investigators. Defendant insisted that if he had planned to kill Moore, he could have done the killing in more isolated places in the prison, which would not have drawn so much attention.

Inmate John Gibson testified in support of defendant. According to Gibson, prior to the incident, he was sitting near the telephones and was waiting his turn to make a call. Moore was on the phone at that time, and defendant was pacing near the phones. Gibson stated that defendant had told him that Moore and defendant had argued earlier,

and Gibson told defendant that he should talk to Moore about it. Defendant approached Moore, who was still on the phone, and tapped him on the shoulder. Gibson stated that Moore and defendant spoke for about two minutes and then Moore dropped the phone and pulled out a shank that looked like an ice pick. Defendant then pulled out his shank. At that point, Moore swung his shank at defendant, and defendant swung back. Gibson stated that at that time, he could not tell whether Moore was stabbed.

Gibson turned around to the prison guard tower to see if the guard had noticed the fight. When Gibson turned his head back to the phone booth, he saw Moore drop his shank and begin to run crouched down while holding his chest or stomach. Moore then struck the restroom wall with his head and fell on the ground. Moore lay on the ground for a second and then got up and zigzagged across the field until he fell again on the baseball field. Gibson then saw other inmates pick up the shanks and throw them toward the bathroom and the fence. Gibson testified that previously he had seen Moore lose his temper and strike other inmates. During cross-examination, Gibson admitted that he had told the DOC investigators that he had not seen anything because he did not want to get involved in the case.

Inmate Kevin Walton also testified for defendant. Walton saw defendant walk up to Moore while Moore was speaking on the telephone. Walton saw defendant touch Moore on the shoulder and Moore turn around and swing at defendant. Walton stated that the thought that Moore and defendant

were engaged in a fist fight. Walton then saw Moore run toward the waist-high concrete bathroom wall and stumble into it head first. Moore got up from the ground and continued to run until he fell on the baseball field. Like Gibson, Walton also admitted that he initially told the investigators that he did not see anything. Later, a DOC investigator testified that both Walton and Gibson had given statements that they were playing football at the time of the stabbing and had not seen anything.

At the close of the testimony, the trial court asked defendant whether he had any "complaints or criticisms about the level or quality of [his attorney's] representation in this case" and whether he was "satisfied with his representation." Defendant replied that he was satisfied with the representation.

At the jury-instruction conference, defense counsel stated that he would tender an instruction on second degree murder. The trial court, however, informed defendant that the decision to tender the instruction belonged to him alone. The court also explained to defendant the difference between first degree murder and the less-included offense of second degree murder. The judge stated that, in his view, the evidence justified an instruction on second degree murder in addition to an instruction on first degree murder.

Specifically, the trial court stated as follows:

> "So, it's a decision that only you can make and it's one where, in effect, you are

saying I will roll the dice, it's all or nothing, or I would ask the [c]ourt to instruct them on what a second degree murder is knowing that they may come in with a second degree, and if you are convinced that it should be all or nothing, then that's your choice.

If you aren't convinced you want them to be told it's all or nothing, I still have arguments to hear whether it's proper to give that instruction, but that, to some people, is a compromise verdict and some defendants afterwards say: I was crazy. I found out afterwards the jury would never have found me guilty of a first degree murder and if they were faced with all or nothing, it would be [*sic*] nothing. Now look what happened They came in with a second degree because they had that way to kind of wiggle around in it, but that's up to you.

Your lawyer can't make the decision. Only you can make the decision."

Defendant informed the court that he did not want to have the jury instructed on second degree murder, stating: "I have been weighing it and thinking about it all day. I have come up with the conclusion that it's either one or the other, acquittal or a first degree."

After deliberation, the jury convicted defendant of first degree murder and unlawful possession of a weapon by a person in the custody of DOC. Defendant waived his right to a sentencing jury, and after hearing evidence in aggravation and in mitigation, the trial court sentenced defendant to death on the first-degree-murder conviction and to a concurrent 30-year prison term on the inmate-weapon-possession conviction.

On direct appeal, the Supreme Court of Illinois affirmed defendant's convictions and death sentence in a 4-3 decision. The dissenting justices stated that the trial court erroneously informed defendant that only defendant individually and not his defense counsel could decide whether to have the jury instructed on second degree murder, and such an error deprived defendant of the right to effective assistance of counsel. See *Griffith*, 158 Ill. 2d at 502, 634 N.E.2d at 1081-82 (Freeman, J., dissenting, joined by Harrison and Nickels, JJ.).

On March 31, 1995, defendant filed a petition for postconviction relief. In the petition, defendant argued that (1) he received ineffective assistance of counsel because his counsel (a) failed to move *in limine* to preclude the State from using his prior murder conviction to impeach his trial testimony and failed to introduce evidence that his prior murder conviction was being appealed, (b) failed to introduce evidence that Moore had ordered acts of violence to be perpetrated upon other inmates, and (c) failed to move to bar his prior murder conviction where that conviction was obtained in violation of his sixth

amendment right; and (2) his death sentence must be vacated because (a) his plea of guilty to his previous murder conviction was invalid and (b) his counsel failed to investigate and present relevant mitigating evidence.

On January 2, 1996, defendant filed an amendment to his postconviction petition, stating his prior Cook County murder conviction had been vacated and remanded for a new trial because the trial court in that case incorrectly admonished defendant that he was eligible for the death penalty even though he was only 16 at the time. In response, the State filed a motion to deny postconviction relief, asserting defendant had forfeited many of the claims and that defendant was not prejudiced by his counsel's alleged errors.

On May 13, 1999, the trial court granted the State's motion to dismiss as to defendant's first three ineffective-assistance-of-counsel claims. The court found that defendant did not raise the claims on direct appeal, and therefore, had forfeited these claims. The court also agreed with the State that defendant had not been prejudiced by the alleged errors. The court specifically noted that during trial, "the trial court closely questioned the defendant regarding any complaint he might have regarding representation[,] and the defendant had none." The court, however, reserved ruling on defendant's claims regarding his death sentence.

On January 6, 2000, defendant filed another amendment to his postconviction petition, claiming

actual innocence regarding Moore's murder. Specifically, defendant stated that the inmates who had testified as eyewitnesses for the State had recanted their trial testimony. Defendant also asserted that Officer Grant had told him that, contrary to Grant's trial testimony, Grant was not sure of the date that the four inmates were in the south yard. Further, Grant would have admitted to the uncertainty of the date if defendant's counsel had questioned Grant on cross-examination during the trial.

In addition to the actual-innocence claim, defendant asserted in his amendment that the State violated his due-process right to a fair trial because the State had coerced its witnesses' testimony. Defendant further argued that, in light of the recantations and Officer Grant's statement, his trial counsel's failure to interview Officer Grant and the recanting witnesses constituted ineffective assistance of counsel.

On May 21, 2000, defendant filed another amendment to his postconviction petition. In it, defendant additionally claimed that (1) he received ineffective assistance of trial counsel because (a) counsel failed to inform the trial jury that Moore was a murderer and (b) counsel failed to object to improper verdict forms, and (2) he had been denied his due-process right to a fair trial by the State's failure to disclose exculpatory evidence, namely Moore's "rap sheets."

On December 7, 2001, the trial court ordered an evidentiary hearing on the recantations of the State's eyewitnesses' testimony. The court, however, denied all defendant's other claims, finding that defendant was not prejudiced by the alleged errors. In its order, the court noted that, on June 22, 1999, defendant was reconvicted in Cook County on his earlier murder charge.

On February 21, 2002, the trial court held an evidentiary hearing in which inmate Nelson, Michael Marzette, and Bernie Cleveland each testified that their previous trial testimony had been false. Inmate Nelson stated at the time of the incident, he was talking on the outside telephone in the south yard when he heard a loud "popping" sound. He turned around and saw Moore and defendant "were fighting." According to inmate Nelson, both Moore and defendant swung at each other "like two or three [times and] like just throwing punches."

Inmate Nelson moved, worrying that the tower guard might fire at the phones. As he turned back, inmate Nelson saw Moore running from the phone booth that Moore was in. According to inmate Nelson, Moore then stumbled into the low wall around the bathroom, ran some more, and fell. Inmate Nelson stated that he did not see who had started the fight or that Mackey, holding a pipe, attacked Moore. Inmate Nelson, however, testified that when Moore started running, he saw defendant holding a shank in the left hand and swinging it at Moore. Inmate Nelson estimated that defendant

followed Moore for about 9 or 10 steps, chasing Moore while swinging the shank "one time."

Inmate Nelson testified that he had told the DOC investigators what he had seen. However, the investigators kept suggesting another story. Inmate Nelson stated that when he told an investigator that Mackey did not do anything, the investigator said: "Are you sure he didn't do it, didn't have no pipe in his hand?" According to inmate Nelson, by the time he finished his discussion with the investigators, he was telling them something "mostly different" than what he had actually seen.

Inmate Nelson also stated that part of the reason why he changed his story was because he was told that he would be able to transfer out of Pontiac, that his previously lost good-time credits would be restored, and that he was afraid of the DOC system. Eventually, inmate Nelson changed his story to the investigators' version--that he had seen defendant stab Moore and that he had seen Mackey holding a pipe. The investigators had "filled in the blanks" in his version of events.

After the investigation, inmate Nelson was transferred to several lower security prisons until he was paroled. Inmate Nelson also stated that before the trial and during a rehearsal of his testimony, he had met with a State's Attorney in the courthouse. The State's Attorney gave him a business card and told him to call if he got into trouble. Inmate Nelson testified that defendant's trial counsel had never contacted him.

Inmate Nelson stated that at the time of the investigation, he was only concerned with himself, so he told the investigators what they wanted to hear to get out of prison sooner. After he was released, he began to feel badly about what he had done to defendant and told a friend that his testimony had been false.

Marzette testified next. Marzette stated at the time of the incident, he was talking on a telephone in the south yard. He turned around when everybody behind him started "scuffling around." He saw a man run and then fell. He returned to his call and later heard that someone had been stabbed. He did not know the man who had been stabbed and did not see defendant "out there that day." Marzette stated he did not pay attention to the incident because it did not concern him.

Sometime after the incident, Marzette was interviewed by a DOC investigator. The investigator told Marzette that someone had been killed on the south yard, that Marzette "knew about it," and Marzette had no reason to lie because Marzette had been "right next to it." Marzette told the investigator that he had not seen anything because he was on the phone, but the investigator insisted that Marzette had witnessed the incident. After a while, the investigator left the room and another investigator, whom Marzette believed was Russell Nelson, entered the room with three or four photos.

Investigator Nelson showed the photos to Marzette and asked him if he saw the person who

stabbed Moore. Marzette stated that he looked at the photos over and over again and told Investigator Nelson that he did not recognize anyone in those photos. Investigator Nelson, however, told Marzette that Marzette "knew what is going on." Moreover, Investigator Nelson "picked up a photo of *** defendant and actually said that this is the guy you saw do the hit." Marzette told Investigator Nelson that investigator Nelson knew more than he did because he did not know anything.

According to Marzette, the investigators threatened him with prosecution for not telling what he knew and told Marzette that they would charge him with Moore's death because he had been at the scene. Moreover, the investigators told Marzette that the leader of the Vice Lords "had a hit" on him, but they could make the hit go away if Marzette cooperated with them.

After the meeting, Marzette returned to his cell but soon requested a second meeting with the investigators because he was afraid of the hit. At the second meeting, Marzette agreed to cooperate with the investigators and testify the way that the investigators wanted.

Marzette stated that he testified falsely because he had been "put on the spot" and was threatened. He did not come forward with his recantation sooner because he was afraid of the gang hit and feared that he would be returned to Pontiac without any protection. In addition, after his release, he was

consumed with grief upon the deaths of several members of his family.

Marzette stated that nobody, including defendant's trial counsel, had contacted him regarding this case. He wanted to do something to correct his false testimony but did not know how to do that. He was glad for the opportunity to tell the truth.

Cleveland also testified at the evidentiary hearing. Cleveland stated he was talking on one of the south yard telephones when the incident occurred. He did not see anything except the "aftermath." When Investigator Nelson interviewed him after the incident, Cleveland told Investigator Nelson that he was talking to his girlfriend on the telephone when the stabbing occurred. Investigator Nelson then asked Cleveland if he had seen the incident and if he could identify Mackey and defendant as the murderers. Cleveland replied that it would depend on what he could get for his information. Cleveland stated that at that time, he had pending cases and would say or do anything to get out of Pontiac.

The next day, Investigator Nelson told Cleveland that he could help him to have the two pending charges "taken care of," but Cleveland would have to tell him who killed Moore. Cleveland then told Investigator Nelson that he had seen the stabbing. According to Cleveland, the investigators then "painted the picture" of what had happened on the south yard, and he followed along. Further, he

and the other two inmate witnesses rehearsed their testimony together before defendant's trial. After the meeting, Cleveland was transferred to a lower security prison. Cleveland also claimed that his then-pending postconviction petition was later granted and his sentence reduced. According to Cleveland, as a result of his cooperation, he served one year of a seven-year sentence in a Logan County case, had a year taken off a six-year sentence from a Cook County case, received six months of good-time credit that had previously been taken away, and had a pending charge of assaulting a correctional officer "disappear." Cleveland also explained that the reason that he never came forward to disclose that his trial testimony had been false was because he was still "in the system."

After the testimony, the trial court noted that there was a lot of testimony about Investigator Nelson and "for all I know, the State wants to call" him. The court further noted that neither party had called Mackey to testify, even though he was "a major player." One of defendant's counsel informed the court that after defendant was sentenced to death, Mackey accepted a 15-year plea "to save his life." Despite the guilty plea, Mackey continued to deny his involvement in the murder.

Following the evidentiary hearing, defendant filed six motions, including a motion to review Cleveland's DOC master files, a motion to conform his petition to the proof elicited at the hearing, a motion to reconsider the verdict-form issue, a motion to take judicial notice of Mackey's DOC file, a motion

to vacate his void convictions because one of the prosecuting attorneys was not a proper special prosecutor, and a motion to take the testimony of Steve Adams, who was an inmate at Pontiac and stated in a previous affidavit that the DOC investigators had used the same pressure tactics on him. On July 2, 2002, the trial court issued an order that denied all of defendant's motions with the exception of defendant's request to review Cleveland's file.

On August 22, 2002, prior to its ruling on the recantation claims, the trial court called Mackey to testify on its own motion. The court noted that "the defense chose not to present him" and "the State decided not to call him." However, "[it] occurred to [the court] that if the [a]ppellate [c]ourt looks at this file," the appellate court would ask "why did not the trial court hear from Mackey?" Mackey then testified. Mackey stated to the court that, at the time of the incident, he was not on the south yard. Instead, he was at the outside gate waiting to enter the south yard. Mackey asserted that he knew nothing about the killing.

After Mackey's testimony, both parties made their final arguments. Defendant's counsel stated in his argument that "the State had the opportunity to bring [Investigator Nelson] in here and have him reestablish his credibility to tell his side of the story, and they did not do it." In addition, the State failed to call the State's Attorney, who inmate Nelson had alleged had promised Inmate Nelson a deal in exchange for inmate Nelson's cooperation.

The State responded that "nothing in the inmates' testimony indicated any secret deals" and "[g]iving a business card to someone when you have interviewed them *** is hardly a secret deal." The State pointed out additionally that Cleveland had misidentified the State's Attorney from whom Cleveland had alleged to have received favorable treatment.

After the final arguments, the trial court denied defendant's claims that were based upon the recanted testimony. The court stated that "without question here, defendant killed Moore with a knife," that "the only issue is self-defense," and that defendant had an "unusual theory" of "a combination of self-defense and an accident." According to the court, "the question becomes how important was the testimony of [Inmate Nelson], Marzette[,] and Cleveland, and how much weight to give their recantations."

The trial court then analyzed each of the three recanting witnesses' testimony and stated that inmate Nelson's testimony "was not helpful" to defendant because inmate Nelson saw Moore and defendant fighting and defendant chasing Moore after "any danger had arguably passed." The court, therefore, concluded inmate Nelson's recantation "hurt *** defendant more than it helps him."

With respect to Marzette's testimony, the trial court found it provided no details that would support a self-defense claim, and it did not demonstrate that "what Moore did" justified defendant's actions. The

court then found Cleveland's testimony to be not credible, stating although it could not tell which version of Cleveland's testimony was the truth," Cleveland was "all over the place on his view of the facts." Further, the court found Cleveland "is capable of saying whatever moves him and he's not particularly concerned with the truth." The court also stated that the forensic evidence presented at trial established that Moore had been attacked by a knife and a pipe, which "supports the trial version of these three witnesses" and "the proposition that Mackey was involved."

Based on the above observation, the trial court concluded that "the proof is simply not there to show that there was perjury the first time around on these three witnesses" and defendant did not establish the "various other claims of improper conduct on the part of the State." The court, therefore, denied defendant's postconviction petition in its entirety. This appeal followed.

II. ANALYSIS

On appeal, defendant raises 11 issues with regard to the trial court's rejection of his postconviction petition. Specifically, defendant argues that (1) the court erred in denying relief because the preponderance of the evidence at the evidentiary hearing showed that the State's eyewitness had testified falsely at trial, the State knew of the false testimony but did nothing to prevent it or correct it, and the recantation had left the State with no evidence that defendant had not

acted in self-defense. (2) the court's denial of his petition must be reversed because the evidence adduced at the evidentiary hearing established that the false trial testimony had been procured by the State through coercion and undisclosed promises; (3) the court should have granted his petition for postconviction relief because evidence at the evidentiary hearing showed that defendant was innocent of first degree murder; (4) a new evidentiary hearing is required where the court applied an improper presumption that discounted the recantation testimony and abused its discretion in refusing to take the testimony of Steve Adams at the evidentiary hearing and to unseal the DOC master files of the recanting witnesses before the hearing. (5) his petition made a substantial showing that the State violated his due-process right to a fair trial by failing to disclose exculpatory evidence of the criminal histories of the murder victim and the State's witnesses; (6) the court erroneously dismissed his ineffective-assistance-of-counsel claim without an evidentiary hearing when his trial counsel failed to fully investigate his self-defense claim; (7) the court erroneously dismissed his ineffective-assistance-of-counsel claim without an evidentiary hearing when his trial counsel failed to interview a prison guard who would have testified that he did not recall the date on which he saw Moore, Mackey, Simmons, and defendant sitting together; (8) the court wrongfully denied his motion to examine Moore's master file where his theory at trial was self-defense, and Moore not only was incarcerated for first degree murder, but also had a long history of criminality and

violence; (9) his murder conviction and sentence should be void because the record indicates that the conviction was obtained primarily through the effort of an attorney who was not appointed as a special prosecutor and was neither an assistant State's Attorney nor an assistant Attorney General; (10) trial counsel's failure to object to the not guilty verdict form that required the jury to find defendant guilty of murder, and appellate counsel's failure to recognize and raise this issue on direct appeal, constituted ineffective assistance of counsel; and (11) the cumulative violation of defendant's constitutional right to a fair trial requires the reversal of his murder conviction and a remand for a new trial.

Clearly, defendant makes many arguments on appeal regarding the denial of his postconviction petition. However, his claims can be divided into three general categories: (1) the trial court's evidentiary ruling, *i.e.*, its refusal to call Steve Adams and to unseal the DOC files of the recanting witnesses, was erroneous; (2) the court's failure to properly consider the evidence that was presented at the evidentiary hearing and its erroneous rejection of his recanting-witnesses claim; and (3) the court's refusal to grant evidentiary hearings on the other claims.

A. Standard of Review

The Supreme Court of Illinois established in *People v. Johnson*, 206 Ill. 2d 348, 356, 794 N.E.2d 294, 300 (2002), that postconviction proceedings in capital cases are governed by section 122-2.1(b) of

the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(b) (West 2002)). Under the provision, a trial court must initially determine " 'whether the petitioner, if indigent, wants to be represented by counsel. After the petitioner makes that choice, the matter is then docketed for further proceedings.' " *Johnson*, 206 Ill. 2d at 356, 794 N.E.2d at 300, quoting *People v. Thomas*, 195 Ill. 2d. 37, 40, 743 N.E.2d 552, 554 (2001). Once a defendant has filed his postconviction petition, the State must then either answer the petition or move to dismiss it. *Johnson*, 206 Ill. 2d at 356, 794 N.E.2d at 300-01. If the State moves to dismiss the petition, the court must examine and rule on the legal sufficiency of each of defendant's claims, taking all well-pleaded facts as true. *Johnson*, 206 Ill. 2d at 356-57, 794 N.E.2d at 301, citing *People v. Ward*, 187 Ill. 2d 249, 255, 718 N.E.2d 117, 123 (1999). If the allegations of the postconviction petition, supported by the trial record and any accompanying affidavits, do not make a substantial showing of a constitutional violation, the petition may be dismissed. *Johnson*, 206 Ill. 2d at 357, 794 N.E.2d at 301, citing *People v. Orange*, 195 Ill. 2d 437, 448, 749 N.E.2d 932, 938-39 (2001). If, however, the petition does make a substantial showing of a constitutional violation, the matter proceeds to a hearing on the merits of the petitioner's claims. *Johnson*, 206 Ill. 2d at 357, 794 N.E.2d at 301, citing *People v. Hobley*, 182 Ill. 2d 404, 428, 696 N.E.2d 313, 326 (1998).

The Supreme Court of Illinois further stated that the standard of review on the dismissal of a

postconviction petition without an evidentiary hearing is *de novo*. If a petitioner's constitutional claims were denied following an evidentiary hearing, the standard of review on appeal is manifest error. *Johnson*, 206 Ill. 2d at 357, 794 N.E.2d at 301. A trial court's decision is manifestly erroneous only if it contains error that was clearly evident, plain, and indisputable. *People v. Frieberg*, 305 Ill. App. 3d 840, 847, 713 N.E.2d 210, 216 (1999).

Regarding a trial court's evidentiary rulings, the Supreme Court of Illinois held that the appropriate standard of review is abuse of discretion if the court's ruling was based on an assessment of facts and is *de novo* if the ruling turned on a question of law. See *People v. Milka*, 336 Ill. App. 3d 206, 232, 783 N.E 2d 51, 73 (2003). An abuse of discretion will be found only where a trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable man would take the view adopted by the trial court. *People v Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000).

B. The Trial Court's Evidentiary Rulings Were Correct

On appeal, defendant argues that the trial court abused its discretion in refusing to take Adams's testimony at the evidentiary hearing and to unseal the DOC master files of the recanting witnesses before the hearing.

First, the trial court correctly denied defendant's request to take Steve Adams's testimony

at the evidentiary hearing. On August 2, 2000, Pontiac inmate Steve Adams submitted an affidavit In it, Adams stated that he was interviewed by Investigator Groesch on the day of the incident. Adams told Groesch that he "had not seen anything" and "knew no information" about the incident. The next day, however, Adams was reinterviewed by Investigator Nelson Investigator Nelson told Adams that he needed Adams "to have seen something" and that he could arrange for Adams to be transferred to the Galesburg Correctional Center if Adams helped him. Investigator Nelson placed a single photograph of defendant on the table before Adams, repeatedly tapped that photograph, and told Adams that he needed Adams's help. Adams, however, did not tell Investigator Nelson that he had seen defendant do anything that day. According to Adams, the October 3, 1990, incident report prepared by Investigator Nelson was false and "it seemed Investigator Nelson had his mind made up that [defendant] did this." Adams admitted, however, that he was transferred to the Galesburg Correctional Center not long after the incident. Adams stated that he did not know the reason for his transfer.

As the State correctly points out, the above affidavit did not show that Adams was threatened by Investigator Nelson to fake testimony. Rather, it showed that Investigator Nelson suspected defendant as the murderer of Moore and wanted Adams's help in the investigation. Further, the fact that Adams was transferred to the Galesburg Correctional Center even though Adams did not

confirm Investigator Nelson's suspicion regarding defendant demonstrated that Adams's transfer was not conditioned upon Adams's willingness to testify falsely. Therefore, contrary to defendant's assertion, Adams's testimony at the evidentiary hearing would not have "corroborated the other inmates' testimony" and would not "have shown a pattern and practice of misconduct" by Investigator Nelson in this case.

The State also correctly points out that Adams's affidavit was included in defendant's postconviction petition, and therefore, the trial court had an opportunity to review and consider the substance of Adams's statement, even though Adams did not testify at the hearing. For these reasons, the court correctly concluded that "the knowledge of Steve Adams [regarding the practice of the DOC investigators] is collateral to the issues herein," and the court's denial of defendant's request to take Adams's testimony at the evidentiary hearing did not constitute an abuse of discretion.

Second, the trial court also correctly denied defendant's request to open the recanting witnesses' DOC files. The Supreme Court of Illinois stated in *People v. Johnson*, 205 Ill. 2d 381, 408, 793 N.E.2d 591, 608 (2002), that a trial court's denial of a postconviction request may be reversed on appeal only for an abuse of discretion. A court's denial of a request that ranges beyond a limited scope of a postconviction proceeding and that amounts to a fishing expedition is not an abuse of discretion. *Johnson*, 205 Ill. 2d at 408, 793 N.E.2d at 608.

In the instant case, the record indicates that prior to the evidentiary hearing, defendant obtained information regarding the revocation and restoration of Cleveland's good-time credit and the sentence that Cleveland had served. At trial, Cleveland was the only recanting witness that specifically stated what benefits he had received for having testified falsely at the trial.

Unlike Cleveland, however, inmate Nelson's testimonies contained only the general allegation that he was promised the restoration of some of his previously lost good-time credits. Specifically, inmate Nelson stated that there was "some discussion of some good[-]time [credits]" and that he received a business card from an assistant State's Attorney and was told to contact the assistant State's Attorney if he needed anything." On the other hand, Marzette's testimony contained the allegation that he was threatened by the DOC investigators with prosecution and a prison gang "hit," and not how his false testimony resulted favorable treatment from DOC. Therefore, neither inmate Nelson nor Marzette testified to what, if any, good-time credit they had actually received. As a result, contrary to defendant's assertion, inmate Nelson and Marzette's additional sentencing information would not have demonstrated how their alleged false testimony had earned them unwarranted restoration of good-time credits, and the trial court correctly ruled that defendant's request for additional inmates' DOC information was unwarranted.

This court further notes that, despite defendant's assertion that the inmates' DOC files contained necessary additional information for his promises-and-coercion-by-the-State claim, defendant is nevertheless able to make detailed allegations of how the State had coerced and promised the inmates to testify falsely at the trial. Defendant, however, fails to specify what additional relevant materials were contained in the DOC files in question and how these additional materials would constitute additional evidence to his claim in question. As a result, defendant was not prejudiced by the trial court's denial of his request for the DOC files in question. This court, therefore, affirms the trial court's denial of defendant's request to open the recanting witnesses' DOC files.

C. The Trial Court's Denial of Defendant's Recanting-Witnesses Claim Was Not Manifestly Erroneous

Defendant also argues that the trial court erred in denying him the postconviction relief because the preponderance of the evidence at the evidentiary hearing showed (1) he was actually innocent of the murder; (2) no evidence showed that he did not act in self-defense; and (3) the false trial testimonies had been procured by the State through coercion and undisclosed promises and, therefore, denied his right to a fair trial. In so contending, defendant asserts that the court applied an improper presumption that discounted the recanted testimonies.

Initially, this court notes that the trial court correctly stated that the inmates' recanted testimonies were "inherently unreliable." In *People v Steidl*, 142 Ill. 2d 204, 568 N.E.2d 837 (1991), the Supreme Court of Illinois held as follows:

> " *** In regards to recantations this court has long held that they are inherently unreliable.
>
> > 'Recantation by a witness of his testimony on a trial does not necessarily entitle a defendant to a new trial. Recanting testimony is regarded as very unreliable, and a court will usually deny a new trial based on that ground where it is not satisfied that such testimony is true. Especially is this true where the recantation relied on involves a confession of perjury. The recanting testimony of witnesses will not ordinarily be regarded as sufficient ground for a new trial except in extraordinary and unusual cases. [Citation.] The affidavit of a recanting witness is not entitled to so much weight as to justify the conclusion that the evidence given by him was corrupt and willfully false. The conclusion of the jury would rather warrant the presumption that his

> testimony was truthful and his affidavit false. Those experienced in the administration of criminal law well know the untrustworthy character of recanted testimony.'" *Steidl*, 142 Ill.2d at 253-54, 568 N.E.2d at 858-59, quoting *People v. Marquis*, 344 Ill. 261, 265, 176 N.E. 314, 315 (1931).

See also *People v. Bickham*, 23 Ill. App. 3d 1074, 1078, 320 N.E.2d 478, 481 (1974); *People v. Bushey*, 170 Ill. App. 3d 285, 289, 524 N.E.2d 738, 741 (1988).

Based on the above statement, the trial court concluded that a witness's recanted testimony is "regarded as inherently unreliable, and a new trial will not be granted on that basis except in extraordinary circumstances." In keeping with the *Steidl* holding, the court properly discounted the recanted testimonies.

Based on the inherent unreliability of the recanted testimonies, this court finds the trial court correctly ruled that the evidence defendant presented at the evidentiary hearing did not warrant a new trial. As stated above, a trial court's denial of a postconviction petition after an evidentiary hearing is reviewed for manifest error. *Johnson*, 206 Ill. 2d at 357, 794 N.E.2d at 301. Specifically, "[t]he question is whether the new evidence was sufficiently compelling that a decision by the trial court to reject that evidence in favor of the original testimony was manifestly erroneous." *People v. Morgan*, 212 Ill. 2d

148, 161, 817 N.E.2d 524, 531 (2004). In this case, the trial court carefully evaluated each recanting witness's testimony at the evidentiary hearing and concluded that "the proof is simply not there to show that there was perjury the first time around on these three witnesses."

In this case, the record shows that defendant admitted that he had stabbed Moore in the chest, and Dr. Stroink stated that the wound and the resulting hemorrhage was the cause of Moore's death. Therefore, as the trial court stated, "without question here, defendant killed Moore with a knife," and "the only issue is self-defense."

To determine the credibility of defendant's self-defense claim, the trial court then analyzed each of the three recanting witnesses' testimonies. The court concluded that inmate Nelson's testimony "was not helpful" to defendant because inmate Nelson saw Moore and defendant fighting, and defendant chasing Moore after "any danger had arguably passed." The court further found that Marzette's testimony provided no details as to what had happened and as a result, it did not demonstrate that defendant's stabbing of Moore was justified. This court agrees with these findings, and therefore, even if inmate Nelson and Marzette's recanted testimonies were true, it would not establish that defendant's killing of Moore was in self-defense.

The trial court further determined that Cleveland's and Mackey's recanted testimonies were not credible. Specifically, the court found Cleveland

was "all over the place on his view of the facts" and was "capable of saying whatever moves him and he's not particularly concerned with the truth." The court also stated that the forensic evidence presented at trial established that Moore had been attacked by a knife and a pipe, which "supports the trial version of these three witnesses" and "the proposition that Mackey was involved." As the Supreme Court of Illinois stated in *Morgan*, 212 Ill. 2d at 162, 817 N.E.2d at 531, the determination of a recanting witness's credibility belongs to the trial court, and without some basis in the record, a reviewing court will not second-guess the trial court's judgment. This court's review of the record did not find such basis in the record, and therefore, the trial court's credibility determination is affirmed.

Defendant contends that, because of the recantation of the three inmate witnesses, the State had no evidence that defendant did not act in self-defense. Specifically, defendant claims that at trial, the State and defendant each produced three eyewitnesses, but the recantation at the evidentiary hearing "turned a 3-3 tie into a 3-0 shutout." The court disagrees. Defendant fails to realize that the "shutout" that he claims would be true only if the recanted testimonies were more credible than the original trial testimonies. As discussed above, the trial court correctly concluded that the inmates' recanted testimonies were less credible than their trial testimonies. As a result, the inmates' trial testimonies continued to serve as the evidence that defendant's killing of Moore was murder and not in

self-defense. See *People v. Pegram*, 124 Ill. 2d 166, 173, 529 N.E.2d 506, 509 (1988) (If an affirmative defense is raised, the State must disprove the affirmative defense beyond a reasonable doubt in addition to proving the other elements of the offense).

This court additionally notes that if defendant's assertion that each recanting witness had perjured himself at the trial but testified truthfully at the evidentiary hearing is correct, then defendant should have had a 6-0 "shutout," an even greater victory margin than defendant claims on appeal. However, as this court agrees with the trial court's rejection of the recanted testimonies in question, defendant's assertion is erroneous, and the State presented sufficient evidence at the trial to disprove that defendant's killing of Moore was in self-defense.

Defendant additionally argues that the witnesses' false trial testimonies had been procured by the State through coercion and undisclosed promises, and, therefore, he was denied his right to a fair trial. Similar to the witness shutout that defendant claims, the success of this argument is also based on the assertion that the recanting witnesses testified falsely at the trial but testified truthfully at the evidentiary hearing. Since this court has already affirmed the trial court's trial-testimony-versus-recanting-testimony credibility determination, we again reject defendant's argument. This court, therefore, finds the court correctly denied defendant's claim that the witnesses' false trial testimonies had been procured

by the State through coercion and undisclosed promises, and he was denied his right to a fair trial.

Based on the above reasons, this court holds that the trial court properly considered the evidence at the evidentiary hearing, and its rejection of defendant's recanting-witnesses claim was not manifestly erroneous.

D. The Trial Court Correctly Refused To Grant Evidentiary Hearings on Defendant's Other Claims

Defendant additionally argues that the trial court erred in refusing to grant an evidentiary hearing on his other claims. Specifically, defendant argues that (1) his petition made a substantial showing that the State violated his due-process right to a fair trial by failing to disclose exculpatory evidence of the criminal histories of the murder victim and the State's witnesses. Further, the court wrongfully denied his motion to examine Moore's master file where his theory at trial was self-defense, and Moore not only was incarcerated for first degree murder, but also had a long history of criminality and violence; (2) the court erroneously dismissed his ineffective-assistance-of-counsel claim without an evidentiary hearing when (a) his trial counsel failed to fully investigate his self-defense claim, (b) his trial counsel failed to interview a prison guard who would have testified that he did not recall the date on which he saw Moore, Mackey, Simmons, and defendant sitting together, and (c) his trial counsel failed to object to the "not guilty" verdict form that required the jury to find defendant guilty of murder,

and his appellate counsel failed to recognize and raise this issue on direct appeal; and (3) his murder conviction and sentence should be void because the record indicates that the conviction was obtained primarily through the effort of an attorney who was not appointed as a special prosecutor and was neither an assistant State's Attorney nor an assistant Attorney General.

First, the trial court correctly refused to grant an evidentiary hearing on defendant's claim that the State's failure to disclose exculpatory evidence of Moore and the State's witnesses' criminal histories was a violation of his due-process right to a fair trial and that the court erred in denying his request to examine Moore's DOC master file. As defendant correctly points out, the United States Supreme Court held that the State is required to disclose evidence that is both favorable to the accused and material to either guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218, 83 S. Ct. 1194, 1196-97 (1963). Favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494, 105 S. Ct. 3375, 3383 (1985).

According to defendant, the favorable, material evidence that the State failed to disclose includes Moore's rap sheet, which would "reveal Moore had a long history of violence," and the State's witnesses' complete criminal histories, which "would have called the credibility of the State's purported

eyewitnesses into further doubt." As the record demonstrates, during the trial proceedings, the State disclosed to defense counsel that Moore was in prison for his convictions of murder, attempted murder, home invasion, and burglary. The testimonies at the trial also established that Moore was the head of the Black Gangster Disciples in the prison, and he had been violent toward defendant and other inmates. Because of this evidence, the jury was fully aware of Moore's violent and aggressive characteristics. Any additional information contained in Moore's rap sheet or in his DOC master file would have been cumulative evidence of the likelihood that Moore was the initial aggressor in the incident. Therefore, it is not reasonably probable that the disclosure of Moore's rap sheet would have changed the result of the trial, and the court correctly denied defendant's request to examine Moore's DOC master file.

Similar to Moore's criminal history, the information regarding Marzette's, Cleveland's, and inmate Nelson's criminal history also was not material evidence. During trial, all three inmates testified to the reasons for their imprisonment, their participation in the gang, their previous inconsistent statements regarding the incident, and their transfer to lower security prisons. Therefore, the jury already knew these witnesses were incarcerated in a maximum-security prison for different felony convictions. Defense counsel also cross-examined the three inmates on the possibility that they had been offered a deal in exchange for their testimonies. As a result, the jury was fully aware that questions

existed as to these inmates' credibility. Contrary to defendant's assertion, the additional evidence of these inmates' prior convictions would not have "called the credibility of the State's purported eyewitnesses into further doubt" to the extent that a different result was reasonably probable. To conclude, because the evidence in question was not material to defendant's guilt or punishment, the trial court correctly rejected defendant's request for an evidentiary hearing based on the State's nondisclosure of the evidence and the court's denial of defendant's request to examine Moore's DOC file.

Additionally, the trial court correctly refused to grant an evidentiary hearing on defendant's ineffective-assistance-of-counsel claim. In *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984), the United States Supreme Court stated to prevail on a claim of ineffective assistance of counsel,

> "[f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial ***."

Moreover, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 696, 104 S. Ct. at 2066.

In this case, defendant claims that his trial counsel failed to fully investigate the incident. Specifically, defendant contends that counsel failed to investigate or present evidence of Moore's history of violence, failed to inform the jury of the offense for which the victim was in prison, failed to obtain and use the prior convictions of the inmates who testified at trial, failed to interview a correctional officer prior to the trial, and failed to fully examine Moore's DOC file. In addition, defendant claims that trial counsel failed to object to the "not guilty" verdict forms that required the jury to find defendant guilty of murder, and his appellate counsel failed to recognize and raise this issue on direct appeal. This court agrees with the State that these alleged errors did not affect the outcome of defendant's trial.

As previously discussed, even though the jury was not informed of Moore's complete criminal history, the evidence presented at the trial enabled the jury to recognize Moore's violent and aggressive characteristics and to adequately evaluate defendant's claim that Moore was the initial aggressor. The jury was also aware that the State's witnesses were all defendant's fellow inmates and a question existed as to the credibility of these witnesses. As a result, the alleged failure by

defendant's counsel to investigate and present Moore and the State's witnesses' additional criminal background information would have only produced cumulative information at the trial. Defendant, therefore, suffered no prejudice.

Defendant also claims that his trial counsel failed to investigate a prison guard who allegedly told defendant that, contrary to the guard's trial testimony, the guard was uncertain of the date that Moore, defendant, and two other inmates were sitting together in the south yard. Further, the guard would have admitted the uncertainty of the date if defendant's counsel had questioned him on cross-examination during the trial. This court agrees with the State that this alleged uncertainty as to the date does not prejudice defendant.

The record clearly shows that defendant admitted that he had an argument on the morning of the incident and he approached Moore later in the day to resolve this argument and to apologize. Defendant further admitted stabbing Moore in the chest, and the forensic evidence established that Moore died as the result of the stabbing. The question for the jury, therefore, was whether the State presented sufficient evidence to establish that defendant's killing of Moore was not in self-defense. Whether a prison guard was certain that Moore, defendant, and two other inmates were sitting together at a table on the south yard at the date of the incident is not relevant to why defendant stabbed Moore on the day of the incident. As a result, defendant's counsel's alleged failure to fully

investigate and question the guard had no impact on the jury's self-defense determination and did not prejudice defendant.

Defendant next argues his trial counsel failed to object to the "not guilty" verdict forms that required the jury to find defendant guilty of murder, and his appellate counsel failed to recognize and raise this issue on direct appeal. The verdict forms in question are as follows:

> "We, the jury find defendant not guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] with the intent to kill [Moore] as charged in [c]ount I.
>
> We, the jury find defendant not guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] with the intent to do great bodily harm to [Moore] as charged in [c]ount II
>
> We, the jury find defendant not guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] knowing said act would cause the death of [Moore] as charged in [c]ount III.
>
> We, the jury find defendant not guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] knowing said act created a strong probability of death to [Moore] as charged in [c]ount IV.

> We, the jury find defendant not guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] knowing said act created a strong probability of great bodily harm to [Moore] as charged in [c]ount V."

Defendant contends that these verdicts precluded the jury from finding defendant not guilty because the forms required the jury to find that defendant had stabbed the victim with the requisite mental state before it could find him not guilty.

As the State correctly points out, the proper test for the correctness or propriety of instructions is not what meaning the ingenuity of counsel can attribute to them, but rather, how and in what sense, under the evidence before them and considering the circumstances of the trial, ordinary men acting as jurors will understand the instructions. *People v Carvajal*, 241 Ill App. 3d 886, 898, 609 N E.2d 408, 417 (1993). In the instant case, the record indicates the jury would be able to correctly understand the verdict forms in question.

The transcript of the proceeding shows that the jury was fully instructed as to each of the State's theories regarding murder, including the various mental states involved in the five different murder charges presented. These instructions informed the jurors that if they find from their consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, they should find defendant guilty. On the other hand, if the jurors find from their consideration of all the evidence that

any one of these propositions has not been proved beyond a reasonable doubt, they should find defendant not guilty. Therefore, the jury was aware a defendant is guilty only if the State has proved every element of the offense that defendant was charged with beyond a reasonable doubt. Moreover, at trial, the jury was given both "guilty" and "not guilty" verdict forms for each of defendant's murder charges. After the deliberation, the jury announced its verdict as follows:

> "We, the jury find [defendant] guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] with the intent to kill [Moore] as charged in [c]ount I. ***
>
> We, the jury find [defendant] guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] with the intent to do great bodily harm to [Moore] as charged in [c]ount II. ***
>
> We, the jury find [defendant] not guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] knowing said act would cause the death of [Moore] as charged in [c]ount III. ***
>
> We, the jury find [defendant] guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] knowing said act created a strong probability of death to [Moore] as charged in [c]ount IV. ***

> We, the jury find [defendant] guilty of the offense of [f]irst [d]egree murder in that he stabbed [Moore] knowing said act created a strong probability of great bodily harm to [Moore] as charged in [c]ount V."

These verdicts clearly demonstrates that, contrary to defendant's assertion, the jury only found defendant guilty after it had determined every element of the offense that defendant was charged was satisfied. Therefore, the jury correctly understood the forms and instruction given at the trial. As a result, defendant suffered no prejudice from his trial counsel's alleged failure to object to the verdict forms.

This court also rejects defendant's claim that he received ineffective assistance of counsel from his appellate counsel because counsel failed to realize and raise the verdict-forms issue on appeal. As the Supreme Court of Illinois stated, appellate counsel is not required to raise and brief every conceivable issue, and it is not incompetence not to raise an issue which in the counsel's judgment is without merit unless his appraisal is patently wrong. *People v. Madej*, 177 Ill. 2d 116, 159, 685 N.E.2d 908, 929 (1997). Here, defendant's appellate counsel correctly recognized that the verdict-forms issue was without merit, and counsel's decision not to raise this issue on direct appeal was proper

Because defendant's trial counsel's alleged errors on the above issues did not deprive defendant's right to a fair trial and did not have any

prejudicial effect on the judgment, the trial court correctly denied defendant's request for an evidentiary hearing based on his ineffective-assistance-of-counsel claim.

Moreover, the trial court correctly refused to grant defendant an evidentiary hearing based on defendant's claim that his murder conviction and sentence should be void because his conviction was obtained primarily through the effort of an attorney who was not appointed as a special prosecutor and was neither an assistant State's Attorney nor an assistant Attorney General. In so arguing, defendant points out that under the Illinois Constitution of 1970, only the Attorney General and his assistants and a county's State's Attorney and his assistants may prosecute a case (see Ill. Const. 1970, art. V, §15; art. VI, §19). Defendant further contends that under the State's Attorneys Appellate Prosecutor's Act (Act) (725 ILCS 210/1 through 11, (West 1992)), an attorney employed by the State's Attorneys' Appellate Prosecutor's office (SAAP) may only assist a county State's Attorney in three classes of cases: (1) controlled-substance cases, (2) drug-profit-forfeiture cases, and (3) labor relation negotiations and litigation.

Section 4.01 of the Act, as it existed at the time of defendant's trial, provided, in pertinent part, as follows:

> "The [o]ffice and all attorneys employed thereby may represent the People of the State of Illinois on appeal in all cases which

> emanate from a district containing less than 3,000,000 inhabitants, when requested to do so and at the direction of the State's Attorney, otherwise responsible for prosecuting the appeal, and may, with the advice and consent of the State's Attorney, prepare, file, and argue such appellate briefs in the Illinois Appellate Court. The [o]ffice may also assist [c]ounty State's Attorneys in the discharge of their duties under the Illinois Controlled Substances Act, the Narcotics Profit Forfeiture Act, and the Illinois Public Labor Relations Act ***." 725 ILCS 210/4.01 (West 1992).

Although the above section sets forth the activities a SAAP attorney may undertake at the direction of the State's Attorney, it does not limit the authority of the trial court to appoint a SAAP attorney to assist a State's Attorney in the prosecution of a criminal case. Illinois courts have held that authority exists independent of any statutory provision. See *People v. Miller*, 13 Ill. 2d 84, 109-10, 148 N.E.2d 455, 469 (1958); *People v. Ward*, 326 Ill. App 3d 897, 902, 762 N.E.2d 685, 690 (2002) ("a trial court is vested with discretion to permit counsel to assist a State's Attorney").

In this case, the record shows that, in rejecting the void judgment claim, the trial court concluded as follows:

"[Defendant] submits that the involvement at trial of Charles Zalar, an attorney for the State's Attorney's Appellate Prosecuter, voids the judgment against the defendant. The People submit that Mr. Zalar's involvement was appropriate and presents no opportunity for relief.

It is clear that the prosecution of [defendant] was undertaken by the [o]ffice of State's Attorney of Livingston County. The State argues that James Casson, an [a]ssistant State's Attorney in Livingston County, was the lead attorney in the People's case against the defendant. The court finds said characterization of Mr. Casson's involvement persuasive. It is agreed that the trial court announced to the jury that Mr. Zalar was present to assist Mr. Casson. It is undisputed that Mr. Zalar was actively involved in presenting the State's case.

The court finds that Mr. Zalar was acting in conjunction with, and at the direction of, the State's Attorney of Livingston County. The court finds that said participation is not a justification for rendering the resulting judgment void.

The court further finds that Mr. Zalar, under the circumstances in this cause, received an implied appointment of the

> court, inasmuch as the trial court permitted Mr. Zalar to prosecute the case with Mr. Casson as the assistant of Mr Casson."

Because a trial court has the discretion to appoint a special prosecutor, and the trial court in the instant case concluded that the attorney in question received an implied appointment, the attorney's participation in the case did not exceed the statutory authority. As a result, defendant's murder conviction is not void

Further, Illinois courts have held that any defect in an attorney's appointment process or in his or her authority to represent the State's interests on a given matter is not fatal to the circuit court's power to render a judgment, and the right to be prosecuted by someone with proper prosecutorial authority is a personal privilege that may be forfeited if not timely asserted in the circuit court." See *People v. Woodall*, 333 Ill. App. 3d 1146, 1159, 777 N.E.2d 1014, 1024-25 (2002); see also *People v. Jennings*, 343 Ill. App. 3d 717, 726-27, 798 N.E.2d 1211, 1219 (2003) (which stated that a defendant forfeits his right to challenge an alleged defective prosecution where his indictment was properly procured by an assistant State's Attorney, he never objected to the prosecution in question, and he was not harmed by the alleged improper prosecution).

Here, James Casson, an assistant State's Attorney in Livingston County, filed the charges against defendant. Casson thereafter appeared on

behalf of the State and participated in all the proceedings. Specifically, Casson was present at the pretrial proceedings, jury selection, the trial, and sentencing. During trial, the trial court announced to the jury that Charles Zalar, the SAAP attorney in question, was present to assist Casson. Defendant never objected to the presence of Zalar, and on appeal, he does not allege that he was harmed by the prosecution at issue. Defendant, therefore, forfeited his claim that his judgment was the result of improper prosecution and was void. As a result, this court affirms the trial court's refusal to grant defendant an evidentiary hearing on this issue.

Because this court finds the trial court's rulings in question were correct, we reject defendant's final argument that the cumulative violation of his constitutional right to a fair trial requires the reversal of his murder conviction and a remand for a new trial.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's dismissal of defendant's postconviction petition.

Affirmed.

MYERSCOUGH, J., with TURNER and KNECHT JJ., concurring.

Appendix G

Supreme Court of Illinois.
The PEOPLE of the State of Illinois, Appellee,
v.
Evan GRIFFITH, Appellant.

No. 73451.
April 21, 1994.
Rehearing Denied May 27, 1994.
Certiorari Denied Oct. 17, 1994.
See 115 S. Ct. 370

Justice HEIPLE delivered the judgment of the court:

Following a jury trial in the circuit court of Livingston County, defendant, Evan Griffith, a prison inmate, was convicted of first degree murder and unlawful possession of a weapon by a person in the custody of the Illinois Department of Corrections. (Ill. Rev. Stat. 1989, ch. 38, pars. 9-1(a)(1), (a)(2), 24-1.1(b).) He was sentenced to death on the murder conviction and to a consecutive 30-year prison term on the weapon conviction. The death sentence has been stayed (134 Ill. 2d R. 609(a)), and the case is now before us on direct appeal (Ill. Const. 1970, art. VI, § 4(b); Ill. Rev. Stat. 1989, ch. 38, par. 9-1(i); 134 Ill. 2d R. 603).

State's Evidence

The State's evidence at trial was essentially as follows. Defendant and the victim, James Jones, also known as Joseph Moore, and Wilford Mackey were

all inmates at the Pontiac Correctional Center in Pontiac, Illinois. Additionally, they were all members of the Black Gangster Disciples street gang. Jones was the Institutional Coordinator (I.C.) of the Black Gangster Disciples within the Pontiac Correctional Center. The I.C. is the leader of a street gang within a prison. The defendant, Evan Griffith, served as Jones' personal secretary and "bodyguard." Due to his position within the gang, he was required by the gang to carry a weapon.

On the morning of October 2, 1990, Jones, Griffith and Mackey were in the prison's south yard. At approximately 11 a.m., Jones was talking on a telephone at a bank of telephones in the yard. While he was on the telephone, Mackey approached him from behind and repeatedly struck him on the head with a metal rod or pipe. Jones dropped the telephone and, unarmed, attempted to defend himself. Griffith then stabbed Jones once in the chest with a "shank." Jones fled but soon collapsed and died. The stab wound was the cause of death.

Defendant's Evidence

The defense theory was self-defense. Defendant claimed that on the night before the stabbing, he received a message that Jones wanted to see him. Defendant sent word that he could not meet with him that night, but would see him the next day. Jones apparently became upset with defendant when he failed to come when summoned. On the following day, defendant attempted to clear things up with Jones. Defendant claims that he tapped Jones on the

shoulder while he was on the telephone. Jones angrily ordered defendant to leave him alone and, a few seconds later, produced a shank.

Defendant then produced a shank and took two steps back. Jones dropped the telephone and stepped towards defendant, bobbing and weaving. At the same time, defendant was jabbing his shank towards Jones to repel him. Jones quickly ducked down. When he came up, defendant's shank penetrated his chest. Both Jones and defendant dropped their knives. Defendant did not intend either to stab or to kill Jones.

The Verdict

At the close of the trial, the jury convicted defendant of first degree murder and unlawful possession of a weapon by a person in the custody of the Department of Corrections.

Defendant waived a sentencing jury. In the first phase of the sentencing hearing, the trial judge concluded that defendant was eligible for the death penalty because the victim was a prison inmate killed on prison grounds.

During the second phase of the sentencing hearing, the State presented evidence in aggravation and defendant presented evidence in mitigation. The trial judge found that death was an appropriate sentence for defendant and that there were no mitigating factors sufficient to preclude the imposition of the death penalty. Accordingly, he sentenced defendant to

death on the first degree murder conviction and to a consecutive 30-year prison term on the inmate weapon possession conviction.

Defendant appeals. Additional pertinent facts will be discussed in the context of the issues raised on appeal.

DISCUSSION

On appeal, defendant claims numerous errors, all without merit. He further claims that the Illinois death penalty statute is unconstitutional. We affirm.

While we will address defendant's contentions on the merits, most of the issues have been waived since either no objection was made at trial or the issues were not properly preserved in a post-trial motion. As to several of the alleged errors, neither an objection nor a post-trial motion was made. *People v. Enoch* (1988), 122 Ill. 2d 176, 119 Ill. Dec. 265, 522 N.E 2d 1124.

Defendant alleges error since the State insinuated that defendant had a gang-related motive for committing the murder. The evidence brought forth by the State and the defense established that Jones held the position of "institutional coordinator" in the Black Gangster Disciples. While cross-examining defense witness Kevin Walton, who is also an inmate at the Pontiac Correctional Center and a member of the Black Gangster Disciples, the following discussion took place:

"[PROSECUTOR]: After James died, was a new I.C selected?

[WITNESS]: No.

[PROSECUTOR]: They never replaced James as the institutional chief?

[WITNESS]: Not in '90.

[PROSECUTOR]: Who is the I.C. now?

[WITNESS]: I don't know.

* * * * * *

[PROSECUTOR]: Did you know an inmate by the name of Mackey?

[WITNESS]: Yes.

* * * * * *

[PROSECUTOR]: Is he a friend of yours?

[WITNESS]: I wouldn't say that. I said I knew him."

Defendant contends that based upon this line of questioning, the jury, without supporting evidence, was led to believe that the defendant killed Jones so Mackey could take over as I.C. of the Black Gangster Disciples. This argument is without merit. Mackey

and defendant were both implicated in Jones' death. Merely asking Walton who the current I.C. is, and asking him whether he knew Mackey, does not improperly insinuate to the jury that Mackey sought to benefit from Jones' death.

Defendant was asked on cross-examination to give the name of the gang official who was above Jones in the Black Gangster Disciples' organizational structure. Defendant refused to answer the question. By looking at sidebar discussions which took place outside the presence of the jury, defendant points out that the State thought that defendant may have been ordered to kill Jones. Thus, defendant argues that he was prejudiced in front of the jury since these allegations were never substantiated. However, the State did not pursue this line of questioning in the presence of the jury. Once the defendant refused to answer who was in charge of the gang, this line of questioning ended and no improper insinuations were made to the jury. The defendant cannot base a claim of prejudice upon statements which were made outside of the jury's presence.

Defendant's next contention of error is that the prosecutor, in closing argument, improperly suggested that the defendant had threatened and intimidated two witnesses for the State. Witnesses Marzette and Cleveland, both inmates at Pontiac Correctional Center, upon initially being interviewed about the attack upon Jones denied knowing anything. On the next day, they admitted that defendant was one of the attackers. Both Marzette and Cleveland testi-

fied that the reason they initially denied seeing anything was because there is a "code of silence" in prison. They described the "code of silence" as when one organization (gang) does something, then regardless of whether or not you are in that organization, you do not talk about what happened. In closing argument, the prosecutor reminded the jury that while Marzette and Cleveland initially denied having any knowledge about the attack on Jones, they both stated the reason for their denial was the "code of silence." The prosecutor added that Marzette and Cleveland had to face being confined in the same cell house with the same individuals who were responsible for the attack. Defendant contends that these comments conveyed to the jury that the witnesses had been threatened by him Contrary to defendant's assertions, the prosecutor did not suggest that the defendant had threatened the witnesses. Rather, he merely reminded the jury of the "code of silence" which they had already heard about.

Defendant also claims that the prosecutor improperly elicited testimony from Marzette and Cleveland that they had been threatened by fellow inmates due to their involvement in this case. Inmates Marzette and Cleveland both testified on direct examination that after they identified the defendant, they were moved out of Pontiac and into other prisons. Additionally, they both stated that due to their involvement in this case they had been threatened by other inmates in their new locations. Defendant contends that this testimony was prejudicial and improper since the jury was led to believe that the threats

emanated from him. Contrary to defendant's assertions, the prosecutor made no references of this type. Rather, the threats which were made upon Marzette and Cleveland illustrated to the jury that the "code of silence" is an actual code of conduct within prisons. Since the jury was aware of the "code of silence," this testimony was not unduly prejudicial to the defendant.

Defendant further alleges that the prosecutor improperly elicited victim impact testimony from the victim's wife. Defendant points out that Innie Jones, the widow of James Jones, testified that she and Jones had been married for 18 years, they had three children and that the children and the victim loved each other. Defendant also relies upon the fact that in closing argument, the prosecutor told the jurors that they did not have to like the victim, but he was a human being, a son, a father, and a husband, and that no one has the right to take somebody's life for no legal reason. Defendant was not prejudiced by these comments. Mere mention of family relationships does not necessarily result in prejudicial error. From Innie Jones' testimony, defendant takes three questions out of context and claims that the prosecutor intentionally elicited this testimony with the purpose of inflaming the jury. This is not the case. The prosecutor was merely establishing a foundation for Innie Jones' testimony. Additionally, after the prosecutor asked about the victim's relationship with his children, the trial judge stopped the questioning in regard to family relationships. After this, no more mention was made to the jury concerning the victim's

family. Defendant failed to object to any of the questions at trial and has now failed to show that the prosecutor was intentionally attempting to inflame the jury. This court has recognized a distinction between making a jury aware of the family left behind and cases where the prosecution has dwelled upon the victim's family to the point that the jury could have related that evidence to the defendant's guilt. *People v. Lear* (1991), 143 Ill. 2d 138, 150, 157 Ill. Dec. 412, 572 N.E.2d 876; *People v. Del Vecchio* (1989), 129 Ill. 2d 265, 288, 135 Ill. Dec. 816, 544 N.E.2d 312.

JURY INSTRUCTIONS

At the close of the evidence, the trial judge held a jury instruction conference. Present were the defense counsel, the defendant himself, and the prosecutor. During the jury instruction conference, the following colloquy occurred:

> "[THE COURT]: [A]nd I wish to at this time, before launching into definitions or issues in a murder case, advise Mr. Griffith of the following: His attorney may request, but it's a decision that only defendant can make, as to whether the Court should give instruction to the jury on what in Illinois is called second degree murder.
>
> In Illinois, a first degree murder is defined when a person kills an individual if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual or another; or he knows that such acts will cause death to

that individual or another; or he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

* * * * * *

It is possible in Illinois for a jury to find a defendant guilty of what is called second degree murder. Many years ago it used to be called voluntary manslaughter, but there has been some changes in what the definition is.

* * * * * *

* * * [I]f the State proves a first degree murder, but you would wish to argue to the jury, and if the Court found it was proper in this case, that at the time you performed the acts which cause the death of James Calvin Jones, also known as Joseph Moore, then that may be-or those may be factors which could reduce a first degree murder to a second degree murder.

In other words, in effect, the jury would be told that if they find that a first degree murder has been proven, but there were circumstances surrounding that first degree murder, specifically, that at the time the murder was committed, you were acting under a sudden and intense passion resulting from serious provocation by him, then those would be elements that could establish a second degree murder, and if I instructed the jury on that, then the State would have the burden of proving

that beyond a reasonable doubt, that those reducing factors were not present and they would have to prove to the jury beyond a reasonable doubt that you did not act under a sudden and intense passion resulting from serious provocation. [We note that this is an incorrect statement of the law. The trial judge's correction of this misstatement is included below.]

What would be serious provocation? If your attorney argued, and I permitted the jury to be instructed, I gather the evidence would be that serious provocation could be from the defense standpoint when you tapped the decedent on the shoulder and he turned and pulled out a shank, that that could be serious provocation. It also could relate to self-defense.

[DEFENSE COUNSEL]: Your Honor, I think that the defendant, contrary to our prior discussions, has concluded that he wishes me to tender that instruction. I don't have one available right now. I would tell the Court that I do intend now to tender such an instruction and would ask the Court to rule on whether it would be given or not now. I will tender the standard Murder II.

* * * * * *

[THE COURT]: Mr. Ahlemeyer, because I was assuming from a conversation before defendant was brought in that perhaps he didn't want them instructed on second degree murder-

[DEFENSE COUNSEL]: I was too. I thought so, your Honor.

[THE COURT]: Let me tell you, Mr. Griffith, practically what it means to you. A second degree murder instruction telling them that they can consider that and telling them what they would have to find in order to find you guilty of second degree murder rather than a first degree murder.

Some defendants say- I don't want to let the jury compromise the verdict. I believe I have a legitimate self-defense or I'm just simply not guilty, for whatever reason, as brought out in the trial, and I want them to make a decision that I'm either guilty of murder or I'm not and I don't want to provide them with something that they may look at and could in effect compromise.

Sometimes people say the defendant is rolling the dice on all or nothing in the murder case, that either the jury is going to be forced to find a first degree murder or nothing and they don't have any in between room because if they are not instructed that they can find something less than murder, first degree murder, then it's all or nothing.

They wouldn't be able to come back and say: We don't agree on first degree murder, but we want to agree something other than that. They would not have any verdict forms for anything other than first degree murder and they couldn't do that and they

are faced with choosing between first degree murder or no murder by virtue of, in this case, self-defense.

If you give them a second degree murder instruction, * * * the State would have to prove beyond a reasonable doubt that there were no reducing factors, there was nothing to kind of make it less serious murder, and that's what we are talking about [We note that the trial judge again misstated the law. His correction is included below.]

A second degree murder is still a murder. They find somebody guilty of murder, and then after they do that, if the defendant says: Yeah, but I was under a sudden and intense passion resulting from serious provocation by whoever got killed, and if the jury gets that instruction, then the jury has to find beyond a reasonable doubt that those factors that would lessen how serious it is are not present.

So, in other words, the State has to prove a negative. They have to prove that there was no serious and intense passion resulting from serious provocation by the dead person and they have to prove that to the jury beyond a reasonable doubt. If they can't do that, then the jury, under the law would find a second degree murder. [Again, this is a misstatement of the law which is corrected below.]

So, it's a decision that only you can make and it's one where, in effect, you are saying I will roll the dice, it's all or nothing, or I would ask the Court to

instruct them on what a second degree murder is knowing that they may come in with a second degree, and if you are convinced that it should be all or nothing, then that's your choice.

If you aren't convinced you want them to be told it's all or nothing, I still have arguments to hear whether it's proper to give that instruction, but that, to some people, is a compromise verdict and some defendants afterwards say: I was crazy. I found out afterwards the jury would never have found me guilty of a first degree murder and if they were faced with all or nothing, it would be [*sic*] nothing. Now look what happened. They came in with a second degree because they had that way to kind of wiggle around in it, but that's up to you.

Your lawyer can't make the decision. Only you can make the decision

[PROSECUTOR]: Judge, I believe when you were telling him about the various burdens and the allocations of the burdens, I believe that you may have misstated or perhaps in my *deafness* I may have misunderstood what you said

As I understand the burdens in a second degree, we have the obligation of proving first degree murder and then the defense had the burden of establishing, by a preponderance of the evidence, mitigating factors * * *. [At this time the trial judge researched who maintains the burden of proof regarding the mitigating factors in a second degree

murder charge.]

[THE COURT]: [The relevant statute provides that] [w]hen a defendant is on trial for first degree murder and evidence of either the mitigating factors * * * has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of killing that would justify or exonerate the killing * * *

Second degree murder is a Class 1 felony. The possible penalties for second degree murder would be a prison term for a period of years of anywhere from four to 15 years, or depending if the defendant is a repeat offender or it's especially heinous or brutal, then it could be an extended term of 15 to 30 years.

So, Mr Griffith, if you would be found guilty of second degree murder, the possible sentence range would be four to 15 years in the Illinois Department of Corrections or an extended sentence of 15 to 30 years and that would carry with it a two year supervised release or parole period.

* * * * * *

So, in other words, I told you before that in effect if I gave a second degree murder instruction, then the State would have to disprove beyond a reasonable doubt that there is serious provocation sufficient to incite an intense passion in you, a reasonable person, and they would have to disprove that * * * James Calvin Jones, also known as Joseph Moore, did something to cause a sudden and intense passion * * *.

In effect, I told you before the State would have to disprove that. The law is not that. The law is that you would have to show by what's called a preponderance of the evidence a mitigating factor that you would be guilty of the lesser offense of second degree murder and the jury would have to find that it would be more probably true than not true that a mitigating factor was present and that at the time * * * James Calvin Jones was killed * * * you were acting under a sudden and intense passion resulting from serious provocation by him.

So, I will try and put it in layman's terms. First of all, I told you what the possible penalty is for second degree murder. Do you understand what that is?

[THE DEFENDANT]: Yes, I do.

[THE COURT]: That's prison time. There's no possibility of a death sentence * * *.

* * * * * *

So if they came back with a second degree murder, you would be looking at consecutive prison time from four to 15 years or from 15 to 30; do you understand that?

[THE DEFENDANT]: Yes I do.

[THE COURT]: Now, in effect, if the jury is given instruction that they can find you guilty of second degree murder, what it means to you is that the State has to prove beyond a reasonable doubt that you committed a first degree murder, then you would have to show to the jury and the jury would have to find from the evidence in the case that it's more probably true than not true that there was what's called a mitigating factor, that the murder of James Calvin Jones, also known as Joseph Moore, occurred while you were acting under a sudden and intense passion resulting from serious provocation by him

So, what it really means is that if the jury said: Well, the State had proved that you intended to kill or do great bodily harm to James Calvin Jones or that you knew that your acts could, will cause his death or you knew that there was a strong probability of death or great bodily harm by thrusting at him with a shank, and therefore that constitutes a first degree murder, the jury then further, in looking at the evidence, if they found those elements of first degree murder proven beyond a reasonable doubt, could determine based on the evidence that

if when the killing took place you were acting under a sudden and intense passion, there was serious provocation by the victim, then they could come back with a second degree murder instead of a first. It's still murder; it's a difference in the responsibility.

Do you follow what I'm saying there?

[THE DEFENDANT]: Yes, I do.

[THE COURT]: And that would be up to you through the evidence presented in the case and in the arguments of your attorney to show them that. Okay.

And some people have argued in higher courts that it's not fair to make you prove that you are less culpable or less responsible because of the circumstances, that the burden ought to stay on the State and this statute has been upheld and it did change the law in Illinois and puts some burden on your side to show that it was-that it was a second degree murder rather than a first degree murder.

Now, I have gone through all of this, and in the meantime Mr. Ahlemeyer [defense counsel] says you have been thinking further and it's your position, and I don't know if it still is because we have talked about it for awhile, that you would like the jury only instructed as to first degree murder and not as to both first and second degree.

[THE DEFENDANT]: I think I would like the jury to consider the first degree or acquittal.

[THE COURT]: Okay. So, in other words, if we give them second degree murder instructions, that is considered kind of a compromise verdict, and the cases have talked about that, and if you go just for guilty or not guilty of first degree murder, the jury gets no information that they can in effect find you guilty of first degree, but then if they find this mitigating factor, in effect come back with second degree, that's the risk you run in deciding I don't want them instructed on second degree and that it's all or nothing.

[THE DEFENDANT]: That's right; that's what I agree.

[THE COURT]: That's a big decision for you and that's one I can't make, your lawyer can't make for you, only you can make.

[THE DEFENDANT]: I have been weighing it and thinking about it all day. I have come up with the conclusion that it's either one or the other, acquittal or a first degree.

[THE COURT]: I would indicate for the record that I believe the defendant has now been properly instructed that it would be the defendant [who] would have to show by a preponderance of the evidence it's probably more true than not true-that there would be a mitigating factor.

I have told him in this case the mitigating factor, I assume, is his testimony that the victim turned, pulled a shank on him, and although these get into cross elements of self-defense and the jury will consider a self-defense to the first degree murder, but they could consider not only self-defense, but that it was a second degree murder.

Now those may not seem real consistent that you say in one breath: I was acting in self-defense and in the other breath-which would result in a finding of not guilty if the jury found self-defense, and then in the other breath say- Well, if you don't find I was acting in self-defense, what he did in his conduct incited me and makes my responsibility somewhat less and it's a second degree murder.

You are shooting for first degree murder with the defense of self-defense which would mean a not guilty if the jury finds self-defense or they are going to find you guilty of first degree murder, and if they find you guilty of first degree murder, only two ways to go, that would be death penalty or a natural life and those are the only two alternatives if you get found guilty of a first degree murder, and if they came back with a second degree then there's no possibility of a death sentence or a natural life.

[THE DEFENDANT]: I understand, your Honor. I will take my chances

* * * * * *

[THE COURT]: Okay So, we will have no series of instruction advising the jury of the definition of a mitigating factor for second degree murder and we will not instruct the jury on both first degree murder and second degree murder and they will be instructed only on first degree murder and the defendant, and I believe that he has thought this through, I believe he understands and I believe he understands he's rolling the dice, It's an all or nothing proposition, and that the court, I believe, would be willing to give both a first degree and second degree instructions, and he says: No, only give the first degree.

Mr. Ahlemeyer, are you satisfied he understands what's going on?

[DEFENSE COUNSEL]: I believe he does.

[THE COURT]: All right "

It has long been recognized that there are four decisions which belong exclusively to the criminal defendant to make after full consultation with his attorney: what plea to enter, whether to waive a jury, whether to testify on his own behalf, and whether to appeal. (*Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987, 993.) These decisions cannot be denied him. Matters of trial tactics and strategy, on the other hand, belong to the lawyer. That is, not to say, however, that the converse is true. In other words, it is not error

merely because the defendant himself may decide a matter of trial strategy rather than his lawyer.

In this case, the defendant was fully informed by the judge about the separate instructions of first and second degree murder. It is clear from the record that the defendant's choice was voluntary, intelligent and knowing. In telling the judge that he did not want the second degree murder instruction to be given, the defendant stated: "I have been weighing it and thinking about it all day. I have come up with the conclusion that it's either one or the other, acquittal or a first degree." With his attorney present, the defendant chose not to instruct the jury on second degree murder. In other words, he wanted the jury to have but two alternatives: guilty of murder in the first degree or not guilty. He did not want to take the chance of a compromise verdict of murder in the second degree. He would go for broke His attorney verified that the defendant understood what he was doing. Neither the defendant's attorney nor the defendant objected to the judge's directive that the defendant and not the attorney make this decision. Neither did the defendant's attorney indicate in any way that he was of a different opinion or that the choice was unsound.

Now, however, having taken his chances and lost, the defendant claims, in hindsight, that it was error to require him to make this decision. We do not agree.

Defendant further incorporates into this argu-

ment that his counsel was somehow ineffective for not objecting on procedural grounds that the decision belonged to counsel exclusively. While it is true that no such objection was raised, a fair reading of the colloquy at the jury instruction conference causes us to conclude that defense counsel willingly acquiesced in and accepted both the directive to the defendant and the defendant's wishes in this regard. There is no indication whatever of any difference of opinion between the defendant and his attorney as to the decision not to give the second degree murder instruction. We find no error here in the judge's directive to the defendant to make this decision. It was a tactical decision to be sure. However, it is only in hindsight that the decision could be deemed unfortunate. Had the defendant chosen to ask for a second degree murder instruction and been convicted of that, he most assuredly would now be raising a similar objection, equally invalid.

Defendant's final contention of error in regard to the jury instruction conference is that the judge gave incorrect, misleading, and coercive admonishment regarding the giving of a second degree murder instruction. Thus, defendant contends that he gave an unknowing and nonintelligent waiver of his right to have the jury instructed on second degree murder. Out of the entire jury instruction conference, which is essentially set out above, defendant takes a few isolated remarks out of context and gives them undue weight.

Defendant relies upon the following alleged er-

rors: (1) the trial judge, although subsequently correcting himself, misstated the law regarding the burden of proof in establishing the mitigating factors for second degree murder; (2) the trial judge failed to state that a valid mitigating factor for the jury to consider in determining second degree murder is an unreasonable belief of self-defense; (3) the trial judge failed to state that the prosecution must disprove defendant's affirmative defense of self-defense; (4) the trial judge told the defendant that theories of self-defense and second degree murder are inconsistent; (5) the trial judge referred to second degree murder as a compromise instruction; (6) the trial judge failed to expressly tell the defendant that an acquittal could occur even if the second degree murder instruction was offered; and (7) the trial judge confused the defendant by telling him that while the law in regard to second degree murder required him to prove that he was less culpable, arguments have been made that placing this burden upon the defendant is unfair.

All of these claims are without merit. A review of the jury instruction conference reveals that of these alleged errors, the trial judge himself either corrected the error, or the alleged comment or omission had no impact upon the jury instruction conference when viewing the conference in its entirety.

SENTENCING ISSUES

Defendant claims that he was denied his right to an individualized capital sentencing hearing. In support of this contention, defendant points out that he

offered mitigating evidence from two prison educators, and a juvenile probation officer who had known the defendant for seven years. In essence these mitigation witnesses testified that in their dealing with the defendant they had found him to be polite, courteous, open to suggestion, and a good worker with fellow inmates. In commenting on this mitigation evidence, the trial judge stated that there is no question that the defendant while dealing with authority figures is a likeable inmate. The judge went on to note, however, that many inmates in Illinois are likeable, including some on death row. Defendant contends that these comments indicate that the trial judge refused to consider this evidence and thought that it had no mitigating value.

Prior to the imposition of the death penalty, an individualized assessment of the circumstances of the crime and character of the defendant must be made. (*People v. Turner* (1993), 156 Ill. 2d 354, 359-61, 189 Ill. Dec. 713, 620 N.E.2d 1030.) Merely because mitigation evidence is presented, however, does not automatically render the evidence sufficient to preclude a sentence of death. Contrary to defendant's assertions, the trial judge did not state that evidence of defendant's "likeability" had no mitigation value. At the same time, however, it is reasonable for a trial court to conclude that a defendant's good behavior in front of authority figures is not necessarily representative of his usual behavior. The trial judge properly considered defendant's mitigation evidence, for whatever it was worth, and properly concluded that it was insufficient to preclude a

sentence of death.

Defendant next claims that the trial judge, in sentencing defendant to death, erroneously believed that the ultimate responsibility for imposing the death sentence rested with the reviewing State and Federal courts. This contention is totally without merit and stems from a mischaracterization of the judge's comments. In making some general comments on the death penalty and the seriousness of the decision he was making, the trial judge stated that due to the current conservative posture of both State and Federal courts, once a death sentence is imposed it is more likely than in the past that a defendant will actually be executed. The judge went on to note that this had been a terrible and agonizing decision for him to make. By looking at this comment in context, it is apparent that the trial judge not only understood that the ultimate responsibility for imposing the death sentence rested with him, but he also believed that defendant would be unable to stop his execution by way of legal maneuvers and that defendant's life rested in his hands.

Defendant's third and final contention of error in connection with his sentencing hearing is that the trial judge, in pronouncing defendant's death sentence, relied upon information outside the record which the defendant had no opportunity to rebut or explain. As with defendant's previous argument, this argument also takes the trial judge's comments out of context. Defendant points out that at one point the trial judge remarked that if an inmate in the Illinois

prison system commits a murder and is sentenced to natural life, generally that means that after serving one year of disciplinary segregation, the inmate will be released back into the general prison population. Additionally, the trial judge noted that without the death penalty there would be nothing to deter an inmate serving a life sentence from killing fellow inmates and prison officials. These comments were but one aspect of the judge's articulation of his rationale for imposition of the death sentence and were not error. In rendering a sentence, a trial judge is presumed to have relied upon only competent and reliable evidence. Additionally, it is defendant's burden to overcome this presumption. The defendant has offered no evidence, nor can we find any, that the trial judge's rhetorical comments served as an improper basis for the death sentence. The record does reveal, however, that in imposing the death sentence the trial court explained that its decision was guided by specific statutory provisions. The trial judge noted that defendant had been proven guilty of first degree murder beyond a reasonable doubt and was found eligible for the death sentence since he killed a prison inmate on prison grounds. In aggravation, the trial judge noted that defendant had an extensive history of violent crime, including convictions for two residential burglaries and a brutal murder by use of a hammer and knives which he committed at the age of 16. It was based upon these factors that the death sentence was imposed.

CONSTITUTIONALITY OF THE DEATH PENALTY

Defendant finally contends that the Illinois death penalty statute is unconstitutional because it places a burden of proof on the defendant which precludes meaningful consideration of mitigation evidence, and because it does not sufficiently minimize the risk of an arbitrary or a capricious death sentence. These arguments have been previously addressed and rejected by this court. (See *People v. Burrows* (1992), 148 Ill. 2d 196, 259-60, 170 Ill. Dec. 317, 592 N.E.2d 997.) Defendant fails to persuade us to reconsider this court's prior holdings.

CONCLUSION

For the above reasons, we affirm the judgment of the circuit court. The clerk of this court is directed to enter an order setting Tuesday, September 20, 1994, as the date on which the sentence of death entered by the circuit court of Livingston County, is to be carried out. Defendant shall be executed in the manner provided by law. (Ill. Rev. Stat. 1991, ch. 38, par. 119-5.) The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution wherein the defendant is now confined.

Affirmed.

Justice MILLER, specially concurring:

I concur in the judgment of the court. The majority properly rejects the defendant's argument that reversible error occurred in the proceedings below when the defendant was allowed to decide whether

to request that the jury be instructed on second degree murder as an included offense of the principal charge of first degree murder.

I do not agree, however, with the implication in the majority opinion that the decision whether to tender jury instructions on an included offense is a matter of trial strategy that defense counsel alone may normally resolve. (158 Ill.2d at 493-94, 199 Ill.Dec. at 723-724, 634 N.E.2d. at 1077.) In my view, this vital determination properly belongs to the defendant, who, in consultation with counsel, must decide whether to provide a jury with the third option of a conviction on a less serious charge. Because the defendant in the present case was allowed to make that important decision, I agree with the majority's ultimate holding that no error in this regard occurred in the proceedings below.

Deciding whether to seek the submission to the jury of instructions on an included offense is closely related to the initial decision of what plea to enter-a decision that properly belongs to the defendant. Section 4-5.2(a) of the American Bar Association Standards for Criminal Justice states:

> "Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
>
> (i) what plea to enter;

(ii) whether to waive jury trial; and

(iii) whether to testify in his or her own behalf." 1 ABA Standards for Criminal Justice, The Defense Function § 4-5.2(a) (2d ed. 1980).

The commentary to the ABA Standards explains the relationship between a defendant's initial plea decision and the decision whether to ask that an included offense be submitted to the jury for its consideration:

"It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. For instance, in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter." 1 ABA Standards, § 4-5.2, Commentary, at 4-68.

Adopting the view expressed in the ABA Standards, our appellate court has concluded that the decision whether to request the submission of an included offense to the jury is one ultimately for the defendant to make, in consultation with counsel (

People v. Blommaert (1992), 237 Ill. App. 3d 811, 817, 178 Ill. Dec. 531, 604 N.E.2d 1054; *People v. Brocksmith* (1992), 237 Ill. App. 3d 818, 827-28, 178 Ill. Dec. 536, 604 N.E.2d 1059, *appeal allowed* (1993), 149 Ill. 2d 653, 183 Ill. Dec. 864, 612 N.E.2d 516), as have courts of other States (*State v. Boeglin* (1987), 105 N.M. 247, 249, 731 P.2d 943, 945; *In re Trombly* (1993), 160 Vt. 215, ---- - ----, 627 A.2d 855, 856-57; *State v. Ambuehl* (App. 1988), 145 Wis. 2d 343, 355-56, 425 N.W.2d 649, 654; contra *Van Alstine v. State* (1993), 263 Ga. 1, 3-4, 426 S.E.2d 360, 362-63).

Given the close relationship between the initial plea decision and the decision whether to tender jury instructions on an included offense, I would not construe *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987, cited by the majority in support of its discussion, to mean that the included-offense decision is simply a matter of trial strategy that counsel alone may determine. Notably, when *Jones* states, "It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal" (*Jones*, 463 U.S. at 751, 103 S.Ct. at 3312, 77 L.Ed.2d at 993), the Court cites section 4-5.2 of the ABA Standards as authority for that proposition. If, as the commentary to the Standards states, the decision whether to seek the submission of a lesser offense is analogous to the decision regarding what plea to enter, and thus something that the defendant himself must ultimately de-

termine, then *Jones* contradicts rather than supports the view suggested by the majority in the present case.

As the record demonstrates, the defendant knowingly and intelligently decided not to tender to the trial court jury instructions on the included offense of second degree murder. The defendant was not prevented from consulting with counsel on this important matter, and the defendant made his determination with full awareness of the potential consequences. The defendant had already discussed the question with counsel and, after a moment's vacillation, reaffirmed his original decision not to tender instructions on the less serious charge We have no reason now to interfere with the defendant's decision, or to relieve him of the responsibility for his choice.

Justice FREEMAN, dissenting:

I conclude that defendant did not receive effective assistance of counsel and was denied the due process of law. (U.S. Const., amends. VI, XIV.) Accordingly, I dissent.

Jury Instruction Conference

At the close of the evidence, the trial judge held a jury instruction conference. Present were not only defense counsel and the prosecutor, but also defendant. When the conference reached the instruction that defines murder, the trial judge addressed defendant individually The trial judge attempted to explain the difference between first degree murder and

the lesser-included offense of second degree murder, and the possible consequences of instructing the jury on each offense. During this lecture, the trial judge explicitly stated on four occasions that only defendant could decide *502 whether to have the jury instructed on second degree murder. On two of those four occasions, the trial judge further told defendant that his attorney could not decide for him.

At the close of this lecture, defendant decided not to have the jury instructed on second degree murder. He stated: "I have been weighing it and thinking about it all day. I have come up with the conclusion that it's either one or the other, acquittal or a first degree." At that point, the trial judge asked defense counsel whether he was satisfied that defendant "understands what's going on?" Defense counsel replied: "I believe that he does."

Defendant contends, *inter alia*, that he did not receive effective assistance of counsel because: (1) the trial judge prevented defense counsel from assisting defendant, and (2) defense counsel failed to provide effective assistance. I agree for both reasons.

Trial Judge

The trial judge's "advice" to defendant-that only defendant individually and not his defense counsel could decide whether to have the jury instructed on second degree murder-was incorrect. Courts have recognized only four decisions that a criminal defendant has the ultimate authority to make, after full consultation with defense counsel: what plea to en-

ter, whether to waive a jury, whether to testify on his or her own behalf, and whether to take an appeal. *Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987, 993; *People v. Ramey* (1992), 152 Ill. 2d 41, 54, 178 Ill. Dec. 19, 604 N.E.2d 275.

Beyond these four decisions, however, trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with his client." (*Ramey,* 152 Ill. 2d at 54, 178 Ill. Dec. 19, 604 N.E.2d 275.) Such decisions are binding on the client. *People v. Bowman* (1990), 138 Ill. 2d 131, 141, 149 Ill. Dec. 263, 561 N E.2d 633.

Specifically, the decision whether to tender a jury instruction on a lesser-included offense is uniquely one of trial strategy (*People v. Gilyard* (1992), 237 Ill. App. 3d 8, 23-24, 177 Ill Dec. 163, 602 N.E.2d 1335; *People v. Palmer* (1989), 188 Ill App. 3d 414, 428, 137 Ill. Dec. 90, 545 N.E.2d 743.) Thus, I am of the opinion that the decision lies within the control of defense counsel. (*Ramey,* 152 Ill. 2d at 54, 178 Ill. Dec. 19, 604 N.E.2d 275; *Bowman,* 138 Ill. 2d at 141, 149 Ill Dec. 263, 561 N.E.2d 633; accord 7A C.J.S. *Attorney & Client* § 208, at 355 (1980); but see, *contra,* 1 Standards for Criminal Justice 4-68 (2d ed. 1980).) Consequently, the trial judge's "advice" to defendant in the present case was erroneous.

I now address whether the trial judge's error deprived defendant of the effective assistance of counsel. The sixth and fourteenth amendments to the

United States Constitution guarantee the right to effective assistance of counsel. (*People v Vrinner* (1978), 74 Ill. 2d 329, 337.) "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington* (1984), 466 U S. 668, 684, 104 S. Ct 2052, 2063, 80 L. Ed. 2d 674, 691; accord *People v. Lee* (1989), 185 Ill. App. 3d 420, 424-26, 133 Ill. Dec. 536, 541 N.E 2d 747

Ordinarily, to establish a claim of ineffective assistance of counsel, a defendant must prove that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's substandard representation so prejudiced defendant as to deny him a fair trial. To prove actual prejudice, a defendant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result would have been different. A " 'reasonable probability' " is a probability sufficient to undermine confidence in the outcome. *People v. Horton* (1991), 143 Ill. 2d 11, 23, 155 Ill. Dec 807, 570 N.E.2d 320, quoting *Strickland v. Washington* (1984), 466 U S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698.

However, there are some circumstances where *Strickland* 's two-part test does not apply. The most obvious circumstance is the complete denial of counsel A criminal trial is presumed unfair if the defendant is denied counsel at a critical stage of the trial. (*United States v. Cronic* (1984), 466 U.S. 648, 659, 104 S Ct. 2039, 2047, 80 L Ed. 2d 657, 668.) Specifi-

cally, no showing of prejudice is required where defense counsel was prevented from assisting defendant during a critical stage of the proceedings. (*Cronic,* 466 U.S. at 659 n.25, 104 S. Ct. at 2047 n.25, 80 L. Ed. 2d at 668 n.25; see *Perry v. Leeke* (1989), 488 U.S. 272, 280, 109 S. Ct. 594, 600, 102 L. Ed. 2d 624, 633.) Whether a defendant has reached a "critical stage" of criminal proceedings depends on "a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson v. Illinois* (1988), 487 U.S. 285, 298, 108 S. Ct. 2389, 2398, 101 L. Ed. 2d 261, 276; accord *People v. Taylor* (1965), 32 Ill. 2d 165, 169, 204 N.E.2d 734.

Applying these principles to the present case, I conclude that the trial judge denied defendant counsel at a critical stage of the trial. Initially, it is clear that a jury instruction conference is a "critical stage" of criminal proceedings. Arguably, the charge to the jury "is that part of the whole trial which probably exercises the weightiest influence upon jurors." (*Andres v. United States* (1948), 333 U.S. 740, 765, 68 S. Ct. 880, 892, 92 L. Ed. 1055, 1070 (Frankfurter, J., concurring, joined by Burton, J.).) The function of jury instructions is to guide the jury in its deliberations and to help it reach a proper verdict through the application of correct legal principles according to the law and the evidence. (*People v. Hester* (1989), 131 Ill. 2d 91, 98, 136 Ill. Dec. 111, 544 N E.2d 797, citing *People v. Gambony* (1948), 402 Ill. 74, 81-82, 83 N.E.2d 321.) Especially in criminal cases with

conflicting evidence, "it is highly essential" that a jury be correctly instructed so that it may properly consider the facts. (*People v. Edwards* (1945), 389 Ill. 563, 566, 60 N.E.2d 100.) "Appropriate and proper instructions to a jury are essential for a fair trial." 23A C.J.S. *Criminal Law* § 1302, at 207 (1989).

Also, it is clear from the record that the trial judge prevented defense counsel from assisting defendant at this critical stage of the trial. The trial judge did not *ask* defendant if he would like to have the jury instructed on second degree murder. Rather, the judge repeatedly told defendant that *only* he and *not* his defense counsel could decide. The trial judge explicitly stated that defense counsel could not participate in the decision, thereby forcing defendant to appear *pro se* on this issue.

The majority simply ignores the law as explained by the United States Supreme Court. The majority states that the trial judge fully informed defendant (albeit initially incorrectly) about the separate instructions for first and second degree murder. The majority concludes that defendant, with his attorney present, made the choice voluntarily, intelligently, and knowingly. 158 Ill. 2d at 493-94, 199 Ill. Dec. at 723-724, 634 N.E 2d at 1077-78.

However, when a court interferes with the ability of counsel to make independent decisions about how to conduct the defense, the court denies the defendant the right to effective assistance of counsel. (*Perry,* 488 U.S. at 280, 109 S. Ct. at 599, 102 L. Ed.

2d at 633, quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2063, 80 L. Ed. 2d at 692.) "The constitutional right to be represented by counsel includes defendant's right to conference with an attorney. Such right to confer is at no time more important than during the progress of a trial." (*State v. Larmond* (Iowa 1976), 244 N.W.2d 233, 236.) I conclude that the trial judge prevented defense counsel from assisting defendant during a critical stage of the proceeding.

Defense Counsel

Defendant contends that he did not receive effective assistance of counsel during the jury instruction conference also because defense counsel did not provide it. A claim of ineffective assistance of counsel is not limited to counsel's performance as a whole, but, rather, may focus on specific errors and omissions. *Cronic*, 466 U.S. at 657 n.20, 104 S. Ct. at 2046 n.20, 80 L. Ed. 2d at 666 n.20.

Applying *Strickland*'s two-part test to the present case, I conclude that defendant did not receive effective assistance of counsel. Referring to the first part of the *Strickland* test, the record shows that defense counsel's conduct fell below an objective standard of reasonableness. See *Horton*, 143 Ill. 2d at 23, 155 Ill. Dec. 807, 570 N.E.2d 320.

The majority quotes at length from the trial judge's lecture on second degree murder. The majority acknowledges that defense counsel did not object to or indicate any disagreement with the trial judge's

erroneous directive that defendant and not defense counsel make the decision. The majority also acknowledges that defense counsel did not indicate any disagreement between himself and defendant. 158 Ill. 2d at 493-94, 199 Ill. Dec. at 723-724, 634 N.E.2d at 1077-78.

This is exactly the point. During the trial judge's lecture, defense counsel did not say or do anything. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the [sixth amendment]." *Strickland*, 466 U.S. at 685, 104 S. Ct. at 2063, 80 L. Ed. 2d at 692; accord *Lee*, 185 Ill. App. 3d at 425, 133 Ill. Dec. 536, 541 N.E.2d 747.

Defense counsel stood mute while the trial judge forced defendant to make a decision that was defense counsel's to make. The record also shows confusion on the part of defense counsel due to a lack of communication between him and defendant. When defendant stated that he did not want the jury instructed on second degree murder, he stood alone.

Referring to the second part of the *Strickland* test, I further conclude that, had the jury been instructed on second degree murder in addition to first degree murder, there is a reasonable probability that the result would have been different. See *Horton*, 143 Ill. 2d at 23, 155 Ill. Dec. 807, 570 N.E.2d 320.

Initially, defendant was clearly entitled to a jury instruction on second degree murder. The majority

previously recounted the evidence adduced at trial. I need not repeat it here. Suffice it to say that the record contained evidence of whether defendant committed second degree murder, *i.e.*, whether unlawful force was threatened against defendant and that he was not the aggressor, and that he unreasonably believed that he acted in self-defense (*People v. Jerome* (1990), 206 Ill. App. 3d 428, 432, 151 Ill. Dec. 244, 564 N.E.2d 221; see Ill. Rev. Stat. 1989, ch. 38, pars. 7-1, 9-2(a)(2)). See *People v. Everette* (1990), 141 Ill. 2d 147, 156, 152 Ill. Dec. 377, 565 N.E.2d 1295.

Also, the defense theory was that defendant acted in self-defense. The jury was instructed on self-defense. A defense of self-defense does not preclude a second degree murder instruction. Rather, if the evidence supports a self-defense instruction, it will also support a second degree murder instruction. (*People v. Lockett* (1980), 82 Ill.2d 546, 550-51, 45 Ill.Dec. 900, 413 N.E.2d 378.) I also note that the trial judge stated that the evidence justified an instruction on second degree murder in addition to one on first degree murder. All of these reasons entitled defendant to have the jury instructed on second degree murder.

Such an instruction would have provided an important third option to the jury. If the jury believed that defendant was guilty of something, but uncertain whether first degree murder had been proved, it might have convicted defendant of the lesser offense rather than convict or acquit him of the greater offense. See *Keeble v. United States* (1973), 412 U.S.

205, 212-13, 93 S. Ct. 1993, 1997-98, 36 L. Ed. 2d 844, 850.

I am also of the opinion that had the jury been instructed on second degree murder in addition to first degree murder, there is a reasonable probability that the result would have been different. The evidence pertaining to second degree murder was closely balanced and conflicting, sufficiently so to undermine confidence in the outcome. I conclude that defendant did not receive effective assistance of counsel.

Since defendant did not receive effective assistance of counsel, he did not receive a fair trial. *Strickland*, 466 U.S. at 684-85, 104 S. Ct. at 2063, 80 L. Ed. 2d at 691-92. As the United States Supreme Court stated:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the

proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. * * * If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama* (1932), 287 U.S. 45, 68-69, 77 L. Ed. 158, 170-71, 53 S. Ct. 55, 64.

This is what happened in the present case. I dissent.

Justices HARRISON and NICKELS join in this dissent.

Appendix H

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 19, 2009

Before

TERENCE T. EVANS, *Circuit Judge*

No. 09-2518

EVAN GRIFFITH,
Petitioner-Appellant,

v.

DONALD GAETZ,
Respondent-Appellee.

Appeal from the United States District
Court for the Central District of Illinois

No. 06-1306

Michael M. Mihm,
Judge.

ORDER

Evan Griffith has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find that Griffith has made a substantial showing of the denial of his constitutional rights, including the denial of his right to due process, violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and deprivation of effective assistance of trial and appellate counsel. *See* 28 U.S.C. § 2253(c)(2). The parties should also address the timeliness of Griffith's petition: specifically, what period of time is tolled for the purposes 28 U.S.C. § 2244(d)(2) when the state supreme court accepts a petition for leave to appeal after the time for filing an appeal has expired, and whether, as in *Jiminez v. Quarterman*, 129 S. Ct. 681 (2009), the decision allowing a late appeal reopens the case. *See also Carey v. Saffold*, 536 U.S. 214 (2002). The parties should also address whether the statute of limitations should be equitably tolled.

Accordingly, the request for a certificate of appealability is GRANTED. If counsel wishes to be appointed to represent Griffith on appeal, Griffith must apply to proceed in forma pauperis status for that purpose.

Appendix I

1:06-cv-01306-MMM # 60 E-FILED
Friday, 12 June, 2009 12:46:14 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

EVAN GRIFFITH,
Petitioner,

v. Case No. 06-1306

DONALD GAETZ, Warden,
Respondent.

ORDER

This matter is now before the Court on Petitioner Evan Griffith's ("Griffith") Application for a Certificate of Appealability, from the dismissal of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 as time barred based on the fact that he had nothing pending to toll the limitations period for 14 days. As amended by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2253 now requires a certificate of appealability in cases arising under § 2254. A certificate may only issue if the applicant makes a substantial showing of the denial of a constitutional right, and any certificate issued must specify what claim(s) merit appellate review.

In considering whether a certificate of appealability should issue, the Court notes that in denying Griffith's § 2254 petition, the Court found that his petition was filed by counsel outside of the one-year period of limitations that governs filings under § 2254 and was fatally untimely. The Court held that the Seventh Circuit's closely analogous holdings in *Fernandez v. Sternes*, 227 F.3d 977, 979-981 (7th Cir. 2000), and *Johnson v. Chandler*, 224 Fed.Appx. 515, 517-18 (7th Cir. 2007), suggest that it would join the Tenth and Eighth Circuits in specifically finding that whether a petition is "pending" is a matter of federal law and that a petition cannot be "pending" during a time when the time for filing has expired yet nothing has in fact been filed, even if a state court subsequently grants leave to file the petition. *See* 6/4/09 Order on Motion to Reconsider. The Court's ruling is consistent with what it believes to be the clearly established state of the law in this circuit, and the extension of the law sought by Griffith is not reasonable. Accordingly, the Court concludes that he has presented no claims debatable among jurists of reason. Griffith has therefore failed to make a substantial showing of the denial of a constitutional right. Having found no issue in this proceeding which warrants appellate review, this Court cannot in good faith issue a certificate of appealability for his § 2254 Petition. If the Court of Appeals is inclined to reconsider *Fernandez* and *Johnson* and extend the law in the manner necessary to render Griffith's petition timely, then the Court presumes that a certificate of appealability will be granted on the appellate level.

CONCLUSION

For the reasons set forth herein, the Court declines to issue a certificate of appealability, and Griffith's Petition for Issuance of a Certificate of Appealability [#57] is DENIED.

ENTERED this 12th day of June, 2009.

s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

Appendix J

No. 101228

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	) Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth District, No. 03-0731
-vs-	) There heard on Appeal from the Circuit Court of Livingston County, Illinois, No. 91-CF-15
EVAN GRIFFITH, Petitioner-Appellant.	) Honorable Harold Frobish, Judge Presiding.

MOTION FOR LEAVE TO FILE
PETITION FOR LEAVE TO APPEAL *INSTANTER*

Appellant, Evan Griffith, by Jon K. Stromsta, Staff Attorney, Office of the State Appellate Defender, Post Conviction Unit, respectfully requests leave to file his Petition for Leave to Appeal *Instanter*. In support of this motion counsel states:

1. Appellant's petition for post-conviction relief was dismissed on August 22, 2003 by the Honorable Harold Frobish.

2. The Appellate Court, Fourth District, affirmed the judgment of the Circuit Court on July 13, 2005.

3. Appellate counsel filed his Notice of Intent to File a Petition for Leave to Appeal on August 1, 2005.

4. Appellant's Petition for Leave to Appeal was due on August 17, 2005.

5. Appellate counsel could not complete Petition for Leave to Appeal by its due date because of counsel's illness over the week that included the due date.

6. On Saturday, August 13, 2005, counsel became ill and developed a fever. Over the next several days, counsel stayed at home with a recurring fever, body aches, chills, congestion and severe sinus headaches. It was only on August 22 that counsel returned to his office to work several partial days and then full days thereafter. Counsel continued his work on the Petition for Leave to Appeal upon his return to work.

6. As counsel had been ill and absent from the office, he could not prepare and file a motion to extension of time pursuant to Supreme Court Rule

315(b) on or before the due date, and therefore must seek leave to file the Petition *Instanter*.

7. The affidavit of counsel in support of this motion is attached hereto.

8. The delay in the filing of the Petition for Leave to Appeal was in no way the fault of Appellant, and Appellant should not be penalized for it.

WHEREFORE, Appellant respectfully requests that the Court grant this motion, and allow Appellant's Petition for Leave to Appeal to be filed *instanter*.

Respectfully submitted,

/s/ JON K. STROMSTA

JON K. STROMSTA
Staff Attorney
Office of the State Appellate Defender
Capital Litigation Division
600 West Jackson Street,
Suite 600
Chicago, Illinois 60661
(312) 814-5100

COUNSEL FOR
PETITIONER-APPELLANT

FILED
SEP 6 – 2005
SUPREME COURT
CLERK

STATE OF ILLINOIS)
) SS
COUNTY OP COOK)

AFFIDAVIT

Jon K Stromsta, being first duly sworn on oath, deposes and says that he has read the foregoing Motion by him subscribed and the facts stated therein are true and correct to the best of his knowledge and belief.

/s/JON K. STROMSTA
JON K. STROMSTA
Staff Attorney

SUBSCRIBED AND SWORN TO BEFORE ME
on September 1, 2005

/s/ Steven Spearie
NOTARY PUBLIC

FILED
SEP 6 – 2005
SUPREME COURT CLERK

No. 101228

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	)	Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth District, No. 03-0731
-vs-	)	There heard on Appeal from the Circuit Court of Livingston County, Illinois, No. 91-CF-15
EVAN GRIFFITH, Petitioner-Appellant.	)	Honorable Harold Frobish, Judge Presiding

PROOF OF SERVICE

TO: Lisa M. Madigan, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, Illinois 60601;

Mr. Robert Biderman, State's Attorneys Appellate Prosecutor, 725 South Second Street, Springfield, Illinois 62704;

Mr. Thomas J. Brown, Livingston County State's Attorney, Livingston County Courthouse, Pontiac, Illinois 61764;

Mr. Evan Griffith, Register No. N-62995,
Menard Correctional Center, P.O. Box 711,
Menard, IL 62259

Please take notice that I have mailed the original and 3 copies of the Motion for Leave to File Petition for Leave to Appeal Instanter to the Clerk of the above court and that I am serving the State's Attorneys Appellate Prosecutor, the State's Attorney and the Appellant each with 1 copy of the motion, by depositing the copies in the U.S. mail with prepaid postage and addressed as indicated above on September 1, 2005.

/s/PAULETTE G. WILLIAMS
PAULETTE G. WILLIAMS

SUBSCRIBED AND SWORN TO BEFORE ME
on September 1, 2005

/s/ Valletta D. Byrd
NOTARY PUBLIC

FILED
SEP 6 2005
SUPREME COURT CLERK

Appendix K

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
SPRINGFIELD 62701

September 13, 2005

Mr. Jon K. Stromsta
Office of the State Appellate Defender
Capital Litigation Division
600 W Jackson Street, S#600
Chicago, IL 60661

TODAY THE FOLLOWING ORDER WAS ENTERED:

No. 101228 - People State of Illinois, respondent, v. Evan Griffith, petitioner.

Motion by petitioner for leave to file petition for leave to appeal instanter. Motion *allowed.*

Order entered by Justice Garman.

Cc: Hon Lisa Madigan
State's Attorney Livingston County
State's Attorneys App. Pros. Springfield
App. Ct /Fourth Dist. (4-03-0731)

Appendix L

Statutory Provisions Involved

28 U.S.C.A. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in

violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable

to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.